Feb 4 1878

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6 Otto p. 258
Oct. 2. 1877

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 202.

THE OHIO AND MISSISSIPPI RAILWAY COMPANY, PLAINTIFF IN ERROR,

VS.

JOHN McCARTHY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

Affd

FILED 13th OCTOBER, 1875.

Feb 4 1878

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Jas Browne

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a The United States of America to John McCarthy, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington, D. C., on the second Monday of October, 1875, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Missouri, wherein the Ohio and Mississippi Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Treat, judge of the circuit court of the United States for the eastern district of Missouri, this 27th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

SAMUEL TREAT,
Judge United States Circuit Court Eastern District of Missouri.

Due service of the within citation is hereby accepted by John McCarthy, defendant in error, this 15th day of June, A. D. 1875.

T. J. ROWE,
Att'y for John McCarthy.

(Indorsed:) United States circuit court, eastern district of Missouri. John McCarthy, d. e., vs. Ohio & Mississippi Railway Company, p. e. Citation. Filed , 1870. , clerk.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the circuit court of the United States for the eastern district of Missouri, greeting:
[SEAL.]

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, at the September term, 1874, thereof, between John McCarthy, plaintiff, and the Ohio and Mississippi Railway Company, defendant, a manifest error hath happened, to the great damage of the said Ohio and Mississippi Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, D. C., on the second Monday of October, 1875, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 27th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Issued at office in the city of S't Louis with the seal of the circuit court of the United States for the eastern district of Missouri, dated as aforesaid.

AUSTIN DRAKE,
Clerk C. C. U. S. Eastern Dist. Mo.,
By H. C. GEISBERG,
Deputy.

Allowed by—

SAMUEL TREAT, *Judge.*

e UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States in and for said district, hereby certify that in obedience to the within writ the court has carefully searched the record and proceedings had in the within entitled cause, and now send to said Supreme Court a full and complete transcript thereof.

In witness whereof I hereto subscribe my name and affix the seal of said court this 25th day of June, A. D. 1875.

[SEAL.] M. M. PRICE, *Clerk*,
By C. M. WARD, *Deputy.*

(Indorsed:) United States circuit court, eastern district of Missouri. John McCarthy, d. e., vs. Ohio & Mississippi Railway Company, p. e Writ of error to the circuit court of the United States for the eastern district of Missouri. Returned and filed , 187 . , clerk.

1 In the circuit court of the United States for the eastern district of Missouri.

Be it remembered that in vacation of said court, and on the ninth day of February, A. D. 1874, there was filed in the office of the clerk of said court a certain transcript, in words and figures as follows, to wit:

STATE OF MISSOURI,
County of S't Louis, ss:

Be it remembered that heretofore, to wit, on the 22d day of November, A. D. 1873, there was filed in the office of the circuit court of S't Louis County a petition, which is in words and figures following, to wit:

Petition.

STATE OF MISSOURI,
County of S't Louis, ss:

In the circuit court of S't Louis County. February term, A. D. 1873.

JOHN MCCARTHY, PLAINTIFF,
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY, defendant.

Plaintiff states that the defendant, the Ohio & Mississippi Railway Company, is a corporation created by and under the State of Illinois, and organized pursuant to an act of the legislature entitled "An act to incorporate the Ohio and Mississippi Railway Company and for other

purposes," approved February 12th, A. D. 1851, and the several
2 acts amendatory thereof.

That the defendant owned, used, and operated a railroad from the town of East S't Louis, in the State of Illinois, to the city of Cincinnati, State of Ohio, connecting with the Marietta & Cincinnati Railroad, and owned, and operated, and used, and run upon their said road in connection with said other two roads, freight cars for the carriage of freight, and at the times hereinafter mentioned were common carriers of goods and freight for hire between the town of East Saint Louis, in the State of Illinois, and the city of Philadelphia, in the State of Pennsylvania.

Plaintiff says that the defendant is a railroad corporation that owns and operates a road terminating opposite to the city of Saint Louis, and whose chief office or place of business is in the city of S't Louis.

That on or about the 23d day of September, 1873, at the town of East S't Louis, in the State of Illinois, the plaintiff delivered to the defendant, being such corporation, certain goods and freight, the property of this plaintiff, to wit, three hundred and four (304) good, sound, fat cattle, of the value of fifteen thousand two hundred dollars, ($15,200.00,) and in consideration of two thousand and eighty ($2,080.00) dollars, agreed to be paid by the plaintiff, entered into an agreement with this plaintiff in writing, subscribed by its duly authorized agent thereto, of which agreement the following is a copy:

This agreement, made this 23d day of September, A. D. 1873,
3 between the Ohio & Mississippi Railway Co., party of the first
part, and John McCarthy, party of the second part, witnesseth:

That the party of the first part will forward to the party of the second part, the following freight, to wit, 16 cars, more or less, from E. S't Louis to Philadelphia, at the rate of $130.00 per car, which is a reduced rate made expressly in consideration of this agreement; in consideration of which the party of the second part agrees to take care of said freight while on the trip, at his or their own risk and expense; and that the party of the first part shall not be responsible for any loss, damage, or injury which may happen to said freight in loading, forwarding, or unloading, by suffocation or other injury caused by over-loading cars, by escapes from any cause whatever, by any accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of track from any cause, or by fire from any cause whatever, or by any other cause except gross negligence; and that said party of the first part and such connecting lines shall be deemed merely forwarders and not common carriers, and only liable for such loss, damage, injury, or destruction of freight as may be caused by gross negligence only and not otherwise.

Witness our hands and seals in duplicate.

OHIO & MISSISSIPPI RAILROAD COMPANY, [SEAL.]
By H. COPE, *Agent*.
JOHN McCARTHY. [SEAL.]

That the defendant did not safely carry and deliver said cattle pursuant to its agreement, nor did it use ordinary care and diligence in carrying and delivering said cattle, but that it so carelessly and negligently conducted in regard to the same that a great number of said three hundred & four fat cattle became maimed, bruised, crippled, and greatly depreciated in value, and that a great number, to wit, twenty, were killed through the gross negligence of the defendant, and totally lost to this plaintiff.

That said cattle were not *lossed*, damaged, or injured in loading, forwarding, or unloading, or by suffocation, or by any other injury caused by overloading cars; that said cattle were not *lossed* by escapes, but that said cattle were maimed, bruised, crippled, killed, and otherwise depreciated in value through the gross negligence of the defendant and connecting lines, in not using ordinary care, diligence, and skill in operating, running, and conducting their said roads.

Plaintiff says that through the gross carelessness & negligence of defendant and said connecting lines, and the want and lack of ordinary care & diligence on their part, a great number of said three hundred & four fat cattle were wholly lost to him, to his damage four thousand dollars.

Wherefore plaintiff prays a judgment for said sum of four thousand dollars.

5 And for another and further cause of action, plaintiff says that on or about the 23d day of September, A. D. 1873, at about six o'clock in the afternoon of said day, in consideration of the sum of two thousand & eighty dollars, then & there agreed to be paid to the defendant by this plaintiff, the defendant made and entered into the agreement aforesaid, and thereby agreed to carry to Philadelphia and there deliver to this plaintiff within a reasonable time after the receipt thereof by them as aforesaid, said three hundred and four fat cattle, the property of this plaintiff, then & there delivered to the defendant, who received the same upon the agreement and for the purposes aforesaid.

That seven days was then the usual time occupied by the trains of the defendant and connecting lines in going from East S't Louis to Philadelphia, and was a reasonable time for the transportion of said cattle.

That the defendant failed to deliver the cattle within that time pursuant to its agreement, but on the contrary so carelessly and negligently conducted and misbehaved in respect to the same in their calling as carriers or forwarders; that they failed to deliver said cattle until twelve days after said cattle were delivered to them, as aforesaid.

That had the defendant not misbehaved with regard to said cattle, and had defendant as it has agreed, and as it was in duty bound, used ordinary care, diligence, & precaution in delivering, forwarding, & carrying said cattle, said cattle would have arrived in the city of Phila-
delphia on the 1st day of October, 1873; that the market value of
6 said three hundred & four fat cattle in the city of Philadelphia,
on the 1st day of October, A. D. 1873, was seventy-five dollars per head, but on the day of delivery they were only worth fifty dollars per head.

And plaintiff further says that by reason of said delay said three hundred & four cattle became greatly depreciated in value, and that plaintiff was put to great expense to procure & supply them with necessary hay & fodder, and that by reason of said delay said cattle became unmarketable.

Plaintiff says by reason of premises he has been damaged three thousand dollars.

Wherefore plaintiff prays judgment for said sum of three thousand dollars & costs.

R. S. MAC DONALD AND
T. J. ROWE,
Atty's for Plaintiff.

And on the same day a summons was issued in said cause, which, with the sheriff's return thereon, is as follows, to wit:

Summons.

COUNTY OF S'T LOUIS, *ss:*

The State of Missouri to the sheriff of S't Louis County, greeting:

We command you to summon the Ohio & Mississippi Railway Company to appear before the judges of our circuit court on the first day of the next term thereof, to be held in the city of S't Louis, within and for the county of S't Louis, on the first Monday of February next, then and there to answer the complaint of John McCarthy, as set forth in the annexed petition.

7 And have you then and there this writ.

Witness, John Lewis, clerk of our said court, with *with* the seal thereof hereto affixed, at office in the city of S't Louis, this 22d day of November, in the year of our Lord eighteen hundred and seventy-three.

[SEAL.] JOHN LEWIS, *Clerk.*

Sheriff's return.

Executed this writ in S't Louis County, on the 22d day of December, 1873, by delivering a copy of the writ and petition as furnished by the clerk to C. S. Cone, treasurer of the Ohio and Mississippi Railway Company, who was in the business office of said company, and had charge thereof at the time of said service. The president or any higher officer of the company cannot be found in my county.

PHILIP C. TAYLOR, *Sh'ff.*
By CON. S. HICKEY, *D'p'ty.*

And on the 4th day of February, 1874, a petition, affidavit, and bond for removal to United States circuit court, was filed in said cause, to wit:

Romoval.

JOHN McCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY, defendant.

S't Louis County, circuit court of S't Louis County. February term, 1874.

The Ohio & Mississippi Railway Company, the defendant in the above entitled suit, states that at the institution of said suit, it was, and now
is, a citizen of the State of Illinois; and that the said McCarthy,
8 the plaintiff at the time he brought said suit, was and now is a
citizen of the State of Missouri; that the matter in dispute in said suit exceeds the sum of five hundred dollars, exclusive of costs; that suit was brought in said court on or about the 22d day of November, A. D. 1873; and now the said Ohio & Mississippi Railway Company upon this its first appearance in court, in accordance with the statutes of the United States in such cases provided, files this its petition that said cause may be removed for trial from this into the next circuit court of the United States, to be held in and for the eastern district of Missouri, on the third Monday in March next, and here offers good and sufficient security for its entering in said last-mentioned court on the first day of its said session in March aforesaid copies of the process against it in said suit as is witnessed by the bond hereto annexed and filed in said cause.

THE OHIO & MISSISSIPPI RAILWAY COMPANY,
By H. P. BUXTON, *Its Att'y in Fact.*

STATE OF MISSOURI,
County of S't Louis, ss:

Harvey P. Buxton, the subscriber of the foregoing petition, being duly sworn, deposes and says that he has read said petition, knows the contents thereof, and that the same is true of his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true, and that he is the attorney in fact of the said Ohio & Mississippi Railway Company.

9 H. P. BUXTON.

Subscribed and sworn to this 3d day of February, A. D. 1874, before me at S't Louis, in said county.

[SEAL.] D. W. PAUL,
Notary Public with and for S't Louis County.

Bond for removal.

We, Albert N. Chrystie and Charles Parsons, both of the city and county of S't Louis, in the State of Missouri, are held and firmly bound unto John McCarthy, of said county of S't Louis, in the sum of three thousand dollars, to be paid to the said McCarthy, for which payment we bind ourselves, our heirs, executors and administrators, firmly by these presents, sealed with our seals, and dated at S't Louis this 2d day of February, 1874.

The condition of this obligation is such, that whereas the said McCarthy has brought a suit against the Ohio & Mississippi Railway Company, which suit is now pending in the circuit court of S't Louis County, and for the removal of which from said court to the circuit court of the United States in and for the eastern district of Missouri, the said railway company has petitioned.

Now, if the said railway company shall, on or before the first day of the next session of said circuit court of the United States, enter therein copies of the process in said suit, and perform such other acts as may be required by said last-mentioned court, and as are required by law upon the removal of said suit thereto, then this obligation shall be void.

10 A. N. CHRYSTIE. [SEAL.]
CHARLES PARSONS. [SEAL.]

Approved in open court.

J. LEWIS, *Cl'k.*

And at a special term of said court, being at the February term, 1874, the following further proceedings were had in said cause, to wit:

Order of removal.

WEDNESDAY, *February 4th*, 1874.

JOHN MCCARTHY
vs.
THE OHIO AND MISSISSIPPI RAILWAY COMPANY.

Now comes the defendant, by its attorney, and files a motion for the removal of this cause to the circuit court of the United States for the eastern district of Missouri, and the court having duly heard and considered the same, doth order that on defendant's filing a bond according to law, to be approved by the court, that the clerk of this court forthwith certify to the circuit court of the United States for the eastern district of Missouri a full and complete transcript of the record and proceedings in this cause as fully as the same remains of record in his office.

Bond filed and approved.

STATE OF MISSOURI,
County of S't Louis, ss:

11 I, John Lewis, clerk of the circuit court of S't Louis County, certify the above to be a full, true, and complete transcript of the record and proceedings had in the above-entitled cause as fully as the same remains of record and on file in my office.

In testimony whereof I hereto set my hand and affix the seal of said court at office in the city of S't Louis this sixth day of February, A. D. 1874.

[SEAL.] JOHN LEWIS, *Clerk.*

And afterwards, to wit, at a circuit court of the United States for the eastern district of Missouri, held in regular session, in pursuance of law, on the third Monday, the 16th day of March, 1874, the following entry appears of record, to wit:

Appearance of Def't.

JOHN MCCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY, defendant.

Now comes the said defendant, by its attorney, and enters its appearance in the above-entitled cause.

And afterwards, at the same term of said court last aforesaid, and on the 17th day of March, 1874, the plaintiff, by leave of court, filed the following amended petition, to wit:

Amended petition.

In the circuit court of the United States for the eastern district of Missouri. March term, 1874.

12 JOHN MCCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY, defendants.

Now comes the plaintiff, by leave of the court, files this his first amended petition, and states that the Ohio & Mississippi Railway Company is a corporation created by and under the laws of the State of Illinois, and organized pursuant to an act entitled "An act to incorporate the Ohio & Mississippi Railroad Company, and for other purposes," approved February 12th, A. D. 1851, and the several acts amendatory thereof:

That by the provisions of said act of incorporation, said Ohio & Mississippi Railway Company has and had the power and right to unite

its railroad with any other railroad now constructed, either in the State of Illinois or the State of Indiana; that the defendant owned and used a railroad from the town of East S't Louis, in the State of Illinois, to the city of Cincinnati, in the State of Ohio, connecting at said city of Cincinnati with the Marietta and Cincinnati Railroad, and the said Marietta & Cincinnati connecting with the Baltimore & Ohio Railroad at the city of Parkersburg; that the said Ohio & Mississippi owned, used, and run upon its said road, in connection with said other two roads, freight cars for the carriage of freight, and at the times
13 hereinafter mentioned it was, in connection with said other two
roads, a common carrier of goods and freight, for hire, between the town of East S't Louis, in the State of Illinois, and the city of Philadelphia, in the State of Pennsylvania.

Plaintiff further states that on or about the 23d day of September, A. D. 1873, at the town of East S't Louis, in the State of Illinois, the plaintiff delivered to the defendant, being such corporation, certain freight, the property of this plaintiff, to wit, three hundred and four (304) good sound fat cattle, of the value of fifteen thousand two hundred dollars, ($15,200.00,) and in consideration of the sum of two thousand and eighty dollars ($2,080.00) agreed to be paid by this plaintiff, entered into an agreement with this plaintiff, in writing, subscribed by its duly authorized agent thereto, of which agreement following is a copy:

This agreement, dmae this 23d day of Sept., A. D. 1873, between the Ohio & Mississippi Railway Co., party of the first part, and John McCarthy, party of the second part, witnesseth: That the party of the first part will forward for the party of the second part the following freight, to wit, 16 cars cattle, more or less, from E. S't Louis to Philadelphia, at the rate of $130.00 per car, which is a reduced rate, made expressly in consideration of this agreement, in consideration of
14 which the party of the second part agrees to take care of said
freight while on the trip, and load and unload the same at his or their own risk and expense, and that the party of the first part, and connecting lines over which such freight may pass, shall not be responsible for any loss, damage, or injury which may happen to said freight in loading, forwarding, or unloading, by suffocation or other injury caused by overloading cars, by escapes from any cause whatever, by any accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of track from any cause, or by fire from any cause whatever, or by any other cause except gross negligence; and that the said party of the first part, and such connecting lines, shall be deemed merely forwarders and not common-carriers, and only liable for such loss, damage, injury, or destruction of such freight as may be caused by gross negligence only, and not otherwise.

Privilege of selling at Cin'ti or Balt.

Witness our hands and seals in duplicate.

[SEAL.] OHIO & MISSISSIPPI RAILWAY COMPANY,
By H. COOPE, *Agent.*
[SEAL.] JOHN McCARTHY.
W. S. HENSLEY, *Phila., Pa.*

15 Plaintiff states that the defendant failed, refused, and neglected, pursuant to its said agreement, to forward said cattle at a reduced rate from the town of East S't Louis to the city of Philadelphia.

That the defendant and said connecting lines did not safely forward, carry, & deliver said cattle pursuant to said agreement, nor did the defendant and said connecting lines use ordinary care and diligence in the forwarding, carrying, and delivering of said three hundred and four cattle; but that the said Ohio & Mississippi Railway Company and said connecting lines so carelessly and negligently conducted in regard to the same that a great number of said three hundred and four cattle became maimed, bruised, crippled, and greatly depreciated in value, and that a great number, to wit, twenty, were killed through the gross negligence of the defendant and said Mariett*e* & Cincinnati & said Ohio & Baltimore Railroads, and their respective agents and servants, and totally lost to this plaintiff.

That said cattle were not lost, damaged, or injured in loading, forwarding, or unloading, or by suffocation or other injury caused by overloading cars; that said cattle were not lost by escape, but that said cattle were maimed, bruised, crippled, killed, and otherwise depreciated in value through the carelessness and negligence of defendant and said connecting lines, the Mariett*e* & Cincinnati & the Ohio & Baltimore Railroads, in not using ordinary care and diligence and 16 skill in operating, running, and conducting their said respective roads.

Plaintiff further says that through the gross carelessness and negligence of defendant and connecting lines aforesaid, and the want and lack of ordinary care and diligence on their part, a great number of said three hundred & four cattle were wholly lost to him, to his damage four thousand dollars. Wherefore, plaintiff prays judgment for said sum of four thousand dollars with his costs.

And for another and further cause of action, plaintiff says that on or about the 23d day of September, A. D. 1873, at about six o'clock in the afternoon of said day, in consideration of the sum of two thousand and eighty dollars, then and there agreed to be paid to the defendant by this plaintiff, the defendant made and entered into the agreement aforesaid, and thereby agreed to forward to the city of Baltimore, in the State of Maryland, and there deliver to this plaintiff, within a reasonable time after the receipt thereof by them as aforesaid, said three hundred and four cattle, the property of this plaintiff, then and there delivered to the defendant, who received the same upon the agreement and for the purpose aforesaid.

That four days was then the usual time occupied by the freight trains of the defendant and connecting lines aforesaid in going from East S't Louis to Baltimore, and was a reasonable and proper time for 17 the transportation of said freight; that the defendant and said connecting lines failed to forward and deliver said cattle within that time, pursuant to defendant's agreement; but, on the contrary, so carelessly and negligently conducted and so misbehaved in respect to the same, in their calling as forwarders & carriers, that they failed to deliver said cattle until ten days after said cattle were delivered to them as aforesaid; that if the defendant and said connecting lines had not misbehaved with regard to said cattle, and had the defendant and said connecting lines, as they were in duty bound, used ordinary care & diligence in forwarding and carrying said cattle, said cattle would have arrived in the city of Baltimore on or about the 28th day of September, A. D. 1873.

That the market value of said three hundred & four cattle in the city of Baltimore, on or about the 28th day of September, 1873, was

($60.00) sixty dollars per head, but on the day of delivery they were only worth fifty dollars per head.

And plaintiff further says that, by reason of said delay, he was put to great expense to procure and supply said cattle with hay and necessary fodder, and that said cattle became unmarketable.

Plaintiff says that by reason of premises he has been damaged three thousand dollars. Wherefore he prays a judgment for said sum of three thousand dollars.

18 R. S. MacDONALD and
T. J. ROWE,
Att'ys for Plaintiff.

And afterwards, to wit, at said March term, 1874, of said court, and on the 28th day of May, 1874, the defendant, by leave of court, filed the following amended answer:

Answer.

Circuit court of the United States in and for the eastern district of Missouri, March term, 1874.

JOHN McCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY,
defendant.

By leave of this court first had and obtained, the said defendant, in answer to the plaintiff's amended petition, says, as to the first cause of action therein alléged, that it is a corporation organized and existing under the laws of the State of Illinois, and that, as such corporation, it has used, and still does use, for the transportation of freight and passengers, a railroad extending from East S't Louis, in the State of Illinois, to the city of Cincinnati, in the State of Ohio; and it admits that it is a common carrier of goods and freight between said places; that at said Cincinnati, the eastern terminus of its said railroad, its track connects, among others, with the railroad of the Marietta and Cincinnati Railroad Company, and that the railroad of said last-mentioned company
19 extends from said Cincinnati to the city of Parkersburg, in the State of West Virginia, where it forms a connection with the railroad of the Baltimore and Ohio Railroad Company, which last railroad continues thence to the city of Baltimore, in the State of Maryland; and that the three railroads aforesaid, when taken in connection, form a continuous route from said East S't Louis to said Baltimore.

And defendant admits that it owned, used, and run upon its said road freight-cars that formed connections with the freight-cars of said other two roads, but denies that the said other two railroads had any interest in, ownership of, or control over the freight cars run over the defendant's railroad as aforesaid, at the time said cattle were transported, or prior or subsequent thereto; and denies that it was a common carrier of goods and freight for him in connection with said two mentioned railroads from said East S't Louis to the city of Philadelphia, in the State of Pennsylvania.

The defendant further admits that the plaintiff delivered to it at said East S't Louis, on or about the 23d day of September, 1873, but subject to the control and under the charge of one William S. Hensley, the consignee thereof, 16 car-loads of cattle, but of what number, condition, or value, or whether they were the property of the plaintiff, the de-

20 fendant has not such information or knowledge as to form a belief, and therefore denies that they were good, sound, fat cattle, three hundred and four in number, and of the value of fifteen thousand and two hundred dollars, or of any value, and that the said cattle were the property of the plaintiff.

The defendant admits that it entered into the agreement copied in the plaintiff's petition, and for the consideration alleged, which was a reduction from the regular rates of transportation over its own road and those of the two other railroad companies aforesaid; that upon the delivery of said cattle in pursuance of said contract, it safely and securely, and under the supervision and care of the plaintiff and the consignee thereof, the said Hensley, transported them in its own 16 cars, suitable therefor, from said East S't Louis to said Cincinnati, in the usual time required therefor, and with no other or further delay than is ordinarily and necessarily incident to the transportation of cattle by and over railroads, and in said transportation used due diligence and care, and with suitable instructions for their carriage and care delivered them at said Cincinnati, its eastern terminus—known to be such by the said plaintiff and said Hensley, in accordance with its custom, which the plaintiff and said Hensley well knew, to the Marietta and Cincinnati Railroad Company aforesaid, the next connecting line of carriers, in as good condition as the length of time necessarily consumed in their carriage, the
21 great distance traversed, and the condition of the said cattle upon their delivery to the defendant admitted.

That said cattle were unloaded from the defendant's cars when delivered as aforesaid by the defendant to the said Marietta and Cincinnati Railroad Company, and when so unloaded, subject to the superintendence and control of the said Hensley and the plaintiff, and, in accordance with the plaintiff's instructions, passed into the custody and under the control of said last mentioned company.

That after the delivery of said cattle to the Marietta and Cincinnati Railroad Company, the said Hensley availed himself of a provision of said contract contained, and removed two car-loads of said cattle from its custody and control and sold them in Cincinnati to parties unknown to the defendant.

That said Marietta and Cincinnati Railroad Company, as soon as said cattle had had a sufficient time and chance for rest and food, loaded all those cattle remaining unsold by the said Hensley, in its own cars, suitable therefor, and subject to the superintendence and care of the said Hensley and the plaintiff, with due diligence and caution safely transported them over its railroad to its eastern terminus at said Parkersburg, and then and there unloaded them from its cars and delivered them in as good condition as the great distance traversed, the length of time necessarily consumed in their carriage, and the delays necessarily incident to transportation by railroad, and the condition of the
22 cattle prior to their reception by said last-mentioned company permitted, to the Baltimore and Ohio Railroad Company, the next connecting line of carriers, with suitable instructions for their carriage the remainder of the way *of* their point of destination.

That the said Baltimore and Ohio Railroad Company then and there received them, and when a sufficient time and chance for the rest and feed of said cattle had been given, loaded them in suitable cars therefor, and subject to the superintendence and under the control of the plaintiff and the said Hensley, and in accordance with the plaintiff's instructions, transported them thence safely over its railroad to said Baltimore, having used due care and diligence in their transportation, and then and there delivered the said cattle not sold, as aforesaid, to the said Hensley, the consignee thereof, in as good condition as the time necessarily consumed in their carriage, the delays necessarily incident to transportation of cattle by railroad, the great distance traversed, and the condition of said cattle previous to their reception by said Baltimore & Ohio Railroad Company permitted.

That the said Hensley, upon the arrival of said cattle at said Baltimore, removed said cattle from the possession and control of the Baltimore and Ohio Railroad Company, and refused to allow the said
Baltimore and Ohio Railroad Company to transport the said cattle
23 thence to said Philadelphia, although it was ready and offered so
to do.

The defendant denies that it failed, refused, and neglected, pursuant to its said agreement, to forward said cattle at a reduced rate from said East S't Louis to said Philadelphia, and it denies that said connecting lines did not safely forward, carry, and deliver said cattle pursuant to said agreement; and it denies that the said connecting lines did not use ordinary care and diligence in the forwarding, carrying, and delivering said cattle; and it denies that the said Ohio and Mississippi Railway and said connecting lines, or either or any of them, so carelessly and negligently conducted in regard to the same that a great number or any number of said cattle became, in consequence thereof, maimed, bruised, crippled, and greatly depreciated in value, and that a great number, to wit, 20 or any number thereof, were killed through the gross negligence of the defendant and said Marietta and Cincinnati Railroad Company, and said Baltimore and Ohio Railroad Company, or any or either of them, or their respective agents or servants, and that they were totally or partially lost to the plaintiff.

And the defendant says that such damage, loss or injury or depre-
ciation, if any, as said cattle sustained or received during their
24 carriage from East S't Louis to said Baltimore was sustained
from each other, owing to their inherent ferocity, or the nature
of the animals, or from other causes, naturally and necessarily incident to the transportation of such animals by such conveyance as that selected by the plaintiff and employed in this instance; through want of proper care of said cattle, on the part of the plaintiff and his agents, during said trip of said cattle; through the loading and unloading of said cattle at different points between East S't Louis and said Baltimore; by suffocation and injury caused by said cars being overloaded by the plaintiff and his agents; by escapes of said animals from said cars; by accidents in the operating of the defendant's railroad, and the railroads of the said Marietta and Cincinnati Railroad Company, and the Baltimore and Ohio Railroad Company; by delays on said railroads caused by storm, fire, failure of machinery and cars on said different railroads, and by obstruction of the said railroad tracks, and from fire; none of which said causes were caused by the gross negligence of the defendant or its agents, or of the said Marietta and Cincinnati Railroad Company, or of the Baltimore and Ohio Railroad Company or its agents.

And the defendant denies that a great or any number of said cattle
were wholly or partially lost to the plaintiff through any gross
25 carelessness and negligence on the part of the defendant and
connecting lines, or through the want and lack of ordinary care
and diligence on their part, or the part of any of them, or that the plaintiff sustained damage in consequence thereof to the amount of four thousand dollars, or any other sum.

The defendant, as to the 2nd cause of action set forth in said petition, denies that on or about the 23d day of September, or any other day, except as above by it set forth, that in consideration of the sum of two thousand and eighty dollars, or any other sum, that was then and there or elsewhere agreed to be paid to the defendant by the plaintiff, or any one, it ever made and entered into the agreement aforesaid, and, except as above stated, did not thereby agree to forward to said Baltimore and there deliver to the plaintiff, within a reasonable time, or any other time, after the receipt thereof by it as aforesaid, said 304 or any other number of cattle, the property of the plaintiff, or any one else, or that the plaintiff then and there delivered to the defendant or that it received the same upon the agreement and for the purpose aforesaid, except by it as above stated.

And the defendant denies that four days was then, or ever has been, the usual time occupied by the freight trains of the defendant and
26 connecting lines, as aforesaid, in going from East S't Louis to Baltimore; and denies that it was a reasonable and proper time for the transportation of said freight; and denies that the defendant and said connecting lines, or either of them, failed to forward and deliver said cattle within that time, or any other time, pursuant to its agreement; and denies that it or any of the said connecting lines so carelessly and negligently conducted and so misbehaved in respect to the same in their calling as forwarders and carriers that they failed to deliver said cattle until ten days after said cattle were delivered to them as aforesaid.

And the defendant denies that said cattle were prevented from arriving or failed to arrive in said Baltimore on or about the 28th day of September, 1873, through misbehavior on its part, or on that of said other railroad companies, or through want of ordinary care or diligence on the part of any of them in forwarding and carrying said cattle, and that the value of said cattle on or about said 28th day of September was 60 dollars per head, and that on the day of their delivery they were worth only 50 dollars per head, or that there was any diminution in value of said cattle between said last-mentioned days, and that by reason of any delay on the part of the defendant and said other railroad companies, or either of them, the plaintiff was put to great or any expense to procure and supply said cattle with hay and necessary
27 fodder, and that said cattle became unmarketable by reason of delay or acts of defendant or either of said railroad companies, and the defendant denies that the plaintiff has sustained any damage whatever.

For further answer in this behalf to the causes of action set forth in the first and second counts of the plaintiff's petition the defendant says that said causes of action therein set forth are one and the same, and that the plaintiff ought not to maintain his action for anything in said counts set forth, because, it says, that with the exception of the two carloads of said cattle sold, as aforesaid, at said Cincinnati all of said cattle were safely and diligently transported to said Parkersburg, and that upon their arrival there, to wit, on the 29th day of September, A. D. 1873, the plaintiff, by his authorized agent, the said Hensley, entered into a contract, in writing, with the Baltimore and Ohio Railroad Company aforesaid, for the transportation by it of said cattle from Parkersburg to Philadelphia, which said contract is in the following words and figures, to wit:

STOCK-CONTRACT.

PARKERSBURG STATION, *Sept. 29th*, 1873.

Memorandum of an agreement made and concluded this day above

named, by and between the Baltimore and Ohio Railroad Com-
28 pany, of the first part, by its agent at the above-named station,
and W. S. Hensley, of the second part, witnesseth:

That whereas said railroad company transports live stock only at first-class rates, as per its tariff, excepting only in the cases when the owner assumes certain risks and incidents specified below, in consideration of obtaining the transportation at reduced rates; and whereas the said party of the second part in the present case assumes and takes upon himself said risks and incidents for said consideration:

Now, therefore, in consideration that said railroad company will transport for the said party such live stock, at the reduced rate of seventy-four dollars for single decks of 20,000 lbs. and dollars for double decks per car-load of lbs., from Parkersburg to Philadelphia, and charges advanced, the said party of the second part does hereby agree to take, and hereby does assume, all and every risk of injuries which the animals, or either of them, may receive in consequence of any of them being wild, vicious, unruly, weak, escaping, maiming, or killing themselves, or each other; or from delays; or in consequence of heat, suffocation, or the ill effects of being crowded upon the cars of the said railroad company; or on account of being injured by the burning of hay, straw, or any other material used by the owner for feeding
the stock, or otherwise, and for any damage occasioned thereby:
29 and also all risk of any loss or damage which may be sustained
by reason of any delay; or from any cause or thing in or incident to the loading or unloading said stock.

And it is further agreed that the said party of the second part is to load and unload said stock at his own risk, the said railroad company furnishing the necessary power to move the cars, under the direction and control of the said party of the second part, who will examine for himself all the means used in the loading and unloading to see that they are of sufficient strength, of the right kind, and in good repair and order.

The party of the second part agrees that the party of the first part shall not, under any circumstances, nor for any cause, be held liable beyond the sum of $200 for injury to or loss of any single animal carried pursuant to this agreement, although the actual value may exceed that amount.

And it is further agreed between the parties hereto that each and every of the persons riding free to take care and charge of said stock does so at his own risk of personal injury, from whatever cause; and the said party of the second part, for the consideration aforesaid, hereby releases and agrees to release, and to hold harmless and keep indemnified, the said party of the first part of and from all damages, actions, claims, and suits on account of any and every the injuries, loss, and
damage hereinbefore refered to, if any such occurs or happens,
30 and from any other casualty or unavoidable accident which may
occur in the transportation of said stock.

And this agreement further witnesseth that the party in charge of the said car-loads shall have authority to change the destination of the said car loads, subject to the conditions, stipulations, and understandings of these presents on the transit to the new destination. Stock must always be counted in and out of the cars by the company's agents or employees.

And this agreement further witnesseth that the said party of the second part has this day delivered to said company fourteen (14) car loads of cattle to be transported to Philadelphia on the conditions, stipulations, and understandings above expressed, under the charge of—

W. M. CLEMENTS,
Station Agent.
W. S. HENSLEY,
Shipper.

That said cattle were transported from said Parkersburg by the said Baltimore and Ohio Railroad Company under and in pursuance of said last-mentioned contract, and not under and in pursuance of the contract set forth in said petition, whereby and by reason whereof the defendant became and was released from all liability for or on account of
31 said cattle after their delivery to said Baltimore and Ohio Railroad Company under said last-mentioned contract.

And the defendant asks to be discharged hence, with its costs.

By its attorney:

D. W. PAUL.

And afterwards, to wit, on the 29th day of May, 1874, the plaintiff filed the following replication:

Replication.

Circuit court of the United States in & for the eastern district of Missouri. March term, 1874.

JOHN McCARTHY, PL'FF,
vs.
THE OHIO & MISSISSIPPI RAILWAY CO., DEF'T.

The plaintiff, for reply to the amended answer of defendant herein, says that it is not true that upon the delivery of said cattle to defendant it safely or securely, or under the supervision or care of the plaintiff, or the consigne thereof, the said Hensley, transported them in its own 16 cars, suitable therefor, from said East S't Louis to said Cincinnati in the usual time required therefor, or with no other or further delay than is ordinarily or necessarily incident to the transportation of cattle by or over railroads, or in said transportation used due diligence or care.

32 It is not true that defendant delivered said cattle to Mariette & Cincinnati Railroad Company in as good condition as the time necessary consumed in their carriage, the great distance traversed, or the condition of the cattle upon delivery to defendant, admitted.

It is not true that said Marietta & Cincinnati Railroad, with due diligence or caution, safely transported them over its railroad to its eastern terminus at said Parkersburg, or then & there delivered them in as good condition as the great distance traversed, the length of time necessarily consumed in their carriage, or the delays necessarily incident to transportation by railroad, or the condition of cattle prior to their reception by last-mentioned company permitted, to Baltimore & Ohio Railroad Company, with suitable instructions for their carriage the remainder of the way to their point of destination.

It is not true that said Baltimore & Ohio Railroad delivered the said cattle not sold, as aforesaid, to said Hensley, the consignee thereof, in as good condition as the time necessarily consumed in their carriage, the delays necessarily incident to transportation of cattle by railroad, the great distance traversed, or the condition of cattle previous to their reception by Baltimore & Ohio Railroad permitted.

It is not true that the damage, loss or injury or depreciation
33 said cattle sustained & received during their carriage from said
East S't Louis to said Baltimore was sustained from each other,
owing to their inherent ferocity or the nature of the animals, or from other causes naturally or necessarily incident to transportation of such animals by such conveyance as that selected by the plaintiff or employed in this behalf.

It is not true that causes of action set forth in plaintiff's petition are one and the same, or that plaintiff ought not to maintain his action for anything in said counts set forth.

It is not true that all said cattle were safely or diligently transported to said Parkersburg, or that upon their arrival there the plaintiff, by his authorized agent, entered into a contract in writing with Baltimore & Ohio Railroad aforesaid for transportation by it of said cattle from Parkersburg to Philadelphia.

Plaintiff admits that said Hensley signed a paper which was handed to him to sign by the duly authorized station-agent of Baltimore and Ohio Railroad, and which said station-agent called a release, but that he did so under protest, and without reading or knowing the contents of same; and that he persistently refused to sign the said paper so presented until he was informed by said duly authorized station-agent
that the said cattle could not be moved until he did so; and
34 plaintiff further says that there was no other railroad or means
by which he could safely transport said cattle from said Parkersburg to said city of Philadelphia.

It is not true that the cattle were transported from said Parkersburg by the said Baltimore & Ohio Railroad under or in pursuance of said last-mentioned contract, or not under or in pursuance of contract set forth in said petition, whereby, or by reason whereof, the defendant became or was released from all liability for or on account of said cattle after their delivery to the said Baltimore & Ohio Railroad Company, under said last-mentioned contract.

R. S. MACDONALD AND
T. J. ROWE.
For Plaintiff.

And afterwards, to wit, on the 1st day of June, 1874, the defendant filed the following demurrer to the plaintiff's replication, as follows, to wit:

Demurrer to reply.

Circuit court of the United States, eastern district of Missouri. March term, 1874.

JOHN MCCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY,
defendant.

The defendant demurs to all that portion of the reply including
35 and following the words "plaintiff admits that said Hensley
signed a paper which was handed him to sign, &c., &c.," for the following grounds of objection:

1st. Because the plaintiff denies the execution of the contract or agreement set out in the defendant's answer, and admits that a paper "called a release" was signed by the plaintiff's agent, the said Hensley, but does not admit or deny that it was the agreement set forth in the answer.

2nd. Because the facts set forth in the reply do not constitute an avoidance of or a defence to the contract or agreement made at Parkersburg and set forth in the answer, or of the release mentioned in the reply.

By its attorney.

D. W. PAUL.

And afterwards, to wit, at the regular stated term of said court, begun and held on the third Monday of September, 1874, and on the 3d day of October, 1874, the following appears of record in said cause, to wit:

Demurrer overruled.

JOHN MCCARTHY, PLAINTIFF,
vs.
OHIO & MISSISSIPPI RAILWAY CO., DEFENDANT.
} Removed from circuit court of S't Louis Co.

The court having considered the questions of law arising upon the demurrer to the reply of said plaintiff, and being fully advised in the premises, is of opinion that the law upon said demurrer is for the plaintiff, and said demurrer is therefore overruled.

36 And afterwards, at said September term of said court, and on the 10th day of October, 1874, the following further proceedings were had, to wit:

JOHN MCCARTHY, PLAINTIFF,
vs.
OHIO & MISSISSIPPI RAILWAY CO., DEFENDANT.
} Removed from circuit court of S't Louis County.

This day come the parties by their respective attorneys, the plaintiff by Thomas J. Rowe and Nat. C. Dryden, esquires, and the defendant by D. W. Paul, esquire, and this case being regularly called for trial, and both parties being ready, on motion, it is ordered that a jury come, and thereupon comes said jury, to wit: A. L. Gibbs, William Worsham, Joseph L. Johnson, Middleton Smoot, William O. Greeves, J. S. Murphy, A. J. Coleman, John Tinney, Charles Yancy, Robert D. Honeyman, George R. Rathburn, and George F. Reppy, twelve good and lawful men, who were sworn well and truly to try the issues joined.

Thereupon the hearing of the evidence was proceeded with, and not being concluded at the hour of adjournment, it is ordered that further proceedings in this case be continued until Monday morning next.

And on Monday, October 12th, 1874, the following further proceedings were had, to wit:

JOHN MCCARTHY, PLAINTIFF,
vs.
OHIO & MISSISSIPPI RAILROAD CO., DEFENDANT.
} Removed from circuit court of S't Louis County.

37 *Judgment.*

This day come again the parties, by their respective attorneys, as on Saturday last, and the jury sworn herein being also present, the hearing of the evidence was resumed, and at the conclusion thereof the case was argued by counsel and submitted to said jury, who, after receiving the charge of the court, retired for consultation, and afterwards returned the following verdict, to wit:

We the jury find for the plaintiff twenty-three hundred dollars.
GEORGE R. RATHBURN,
Foreman.

It is therefore now considered by the court that the plaintiff, John McCarthy, recover against the defendant, the Ohio and Mississippi Railroad Company, the sum of ($2,300.00) twenty-three hundred dollars, the damages so as aforesaid by the jury assessed, and also the costs herein expended, and that execution be issued therefor.

And afterwards, at the same term of said court last aforesaid, and on the 16th day of October, 1874, the following proceedings were had, to wit:

JOHN MCCARTHY, PLAINTIFF,
vs.
OHIO & MISSISSIPPI RAILROAD CO., DEFENDANT. } Removed from circuit court of S't Louis County.

This day comes the defendant, by its attorney, D. W. Paul, esquire, and presents its bill of exceptions herein, which, being examined, is signed and ordered to be filed and made a part of the record herein.

38 And the said bill of exceptions, so signed and filed, is in words and figures as follows, to wit:

Bill of exceptions.

UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

In the circuit court of the United States in and for the eastern district of Missouri.

JOHN MCCARTHY, PLAINTIFF,
vs.
THE OHIO & MISSISSIPPI RAILWAY COMPANY, defendant.

Be it remembered, that on the eleventh day of October, A. D. 1874, the said cause coming on to be heard before a jury, and the respective parties therein being present, with their respective attorneys, and the jury having been duly empannelled and sworn.

Pl'ff's evidence.

The plaintiff, to maintain the issues on his part to be maintained, introduced testimony tending to show:

That the plaintiff executed the contract set forth in his petition, and thereunder, on Tuesday, the 23d day of September, A. D. 1873, delivered to the defendant, for carriage from East S't Louis to Philadelphia, 304 good, fat cattle.

That under said contract the defendant received said cattle for transportation.

That they were loaded in 16 of the defendant's cars, good and suitable therefor, and that the stock went forward under the care and supervision of W. S. Hensley, the consignee thereof, and Pat. Bellew.

39 That during their transportation over the defendant's railroad, owing to delays, they failed to reach Cincinnati until Thursday, September 25th, from 6 to 12 hours after they were due there, through which delays and unsteady running of the cars the cattle sustained serious and severe injuries; that these injuries were caused by want of skill and carelessness on the part of defendant's employees and defects in the machinery moving the cattle.

That the cattle were unloaded and delivered at Cincinnati, the terminus of defendant's railroad, to the Marietta and Cincinnati Railroad Company, the next connecting line of carriers; that the said Hensley selected 42 of the said cattle that were, owing to their injuries, unfit to go further, and sold them in Cincinnati.

That on the next morning, Friday, September 26th, the Marietta and Cincinnati Railroad Company loaded the cattle remaining unsold in fourteen cars, good and suitable therefor, belonging to it, and transported them thence to Parkersburg, the terminus of its route, and there unloaded and delivered them to the Baltimore and Ohio Railroad Company, the next connecting line of carriers.

That through a delay caused by the unskilfullness of the conductor between Cincinnati and Parkersburg the cattle did not arrive in Parkersburg until Saturday afternoon, September 26th, about five hours after the train was due there.

40 That the Baltimore and Ohio Railroad Company, through its agent, one W. M. Clements, refused to send out the cattle on Sunday from Parkersburg; that he might have done so; that he detained the cattle there until Monday morning, September 29th.

That soon after the cattle left Parkersburg in a train containing the cattle loaded in cars suitable therefor, the train was run into by another train following it; that the collision was caused by carelessness of the engineer of the hind train; that this collision resulted in further injuries to the cattle; that the cattle were transported over the railroad of the Baltimore and Ohio Railroad Company from Parkersburg to Baltimore, and that the cattle arrived at Baltimore at a seasonable hour on Wednesday morning, October 1st.

That the usual time required to transport cattle from East S't Louis to Baltimore over the said railroads was from five to six days; that the two market days at Baltimore are Tuesdays and Wednesdays; that Tuesday is the day for the retail, and Wednesday the day for the wholesale market; that on Tuesday there was a good market, and on Wednesday a poor one for the sale of the cattle; that the cattle would not sell then for as much on Wednesday in to five or six dollars per head as they could have been sold for on Tuesday.

That at Parkersburg, on Saturday, the said Hensley told the agent of the Baltimore and Ohio Railroad Company that he wished to
41 arrive in Baltimore on Tuesday morning; that owing to the failure of said agent to send out the cattle on Sunday morning the cattle did not arrive at Baltimore until Wednesday morning; that in consequence of which, and the delays, defective machinery, the unskilfullness of the employees of the different railroads, and collision aforesaid, the cattle were greatly injured, and the plaintiff thereby suffered great damage.

That the contract set forth in the defendant's answer was executed by the said Hensley under protest, and that he refused to sign it until informed by the agent of the Baltimore and Ohio Railroad Company that it would not carry the cattle unless he would sign it, and that he did so because he had no other way of gettting the cattle to Baltimore except by driving.

As to the ownership of the cattle, the plaintiff testified as follows: "William S. Hensley besides myself was interested in the cattle. He had a half interest in the profits, I was the owner."

This was all the testimony in relation to the ownership of the cattle, and thereupon the plaintiff rested.

Thereupon the court adjourned until October 12, A. D. 1874, at 10 o'clock a. m.

42 And upon the 12th day of October, A. D. 1874, the court having met pursuant to adjournment, and the jury being present, the defendant thereupon to maintain the issue on its part to be maintained introduced testimony tending to show:

Def't's evidence.

That the cattle were transported from East S't Louis to Baltimore in the usual time required in the transportation of cattle between said points; that the cattle arrived both in Cincinnati and Baltimore in as good condition as the distance traversed, the time necessarily consumed in their carriage and the transportation by rail permitted, and that the delays complained of were not caused by defective machinery or unskilfulness of its employees, and were occasioned by causes which were unavoidable; that it and its connecting lines transported the cattle with suitable diligence and care, in good cars, drawn by good locomotives and operated by good engineers, and that the injuries that the cattle sustained were such as are natural and incidental to railroad transportation; that at the collision near Parkersburg the cattle sustained no injury.

That the cattle arrived in Baltimore in time for the market on Wednesday, and that the market-days in Philadelphia were Saturdays and Mondays; that the Baltimore and Ohio Railroad Company was not able to send the cattle out of Parkersburg on Sunday because they had not the cars necessary therefor at the time; that they were sent at the first opportunity, which was on Monday morning; that they were transported over the Baltimore and Ohio Railroad, the contract executed at Parkersburg and set forth in the defendant's answer having been previously signed. 43

And thereupon the defendant rested the defence, and the plaintiff offered no further testimony; and this was all the testimony offered on either side.

And thereupon the case was closed upon the evidence and testimony, and the defendant, by its counsel, requested the court to give the following instructions to the jury on behalf of the defendant:

Instructions asked by def't.

1. The court instructs the jury that the plaintiff cannot recover damages for such loss, damage or injury as was sustained by his cattle by loading, forwarding, or unloading; by suffocation or other injury caused by overloading cars; by escapes from any cause whatever; by any accident in operating the road, or delay caused by failure of machinery or

cars, or obstruction of track from any cause except gross negligence;
44 or from any cause not occasioned by gross negligence on the part of the Ohio & Mississippi Railroad Company, or the Marietta and Cincinnati Railroad Company, or the Baltimore and Ohio Railroad Company.

2. The court instructs the jury that under the contract made by the plaintiff with the defendant the plaintiff can only recover for such injuries or damages as the cattle sustained before they passed into the possession of the Marietta and Cincinnati Railroad Company.

3. The court instructs the jury that the plaintiff cannot recover for such injuries as his stock sustained after they passed into the possession of the Baltimore and Ohio Railroad Company at Parkersburg.

4. The court instructs the jury that it was not the duty of the defendant, or its connecting line, the Baltimore and Ohio Railroad Company, to start out from Parkersburg on Sunday with the plaintiff's cattle, and that the plaintiff cannot recover damages for failure to do so.

5. The court instructs the jury that they must find for the defendant, unless they shall believe from the evidence that the plaintiff was the sole owner of the cattle in controversy, and that if they shall believe from the evidence that W. S. Hensley was a part owner of the cattle, or in the proceeds thereof, that they must find for the defendant.

45 *Exceptions.*

Which instructions and propositions of law were refused by the court, and as the same were severally refused by the court, the defendants then and there excepted to the court in that behalf.

And the defendant by its counsel further requested the court to give the following instructions to the jury on its behalf, which were given to them by the court:

6. The court instructs the jury that the plaintiff cannot recover for such injuries as the cattle sustained through the negligence of the defendant or of the other railroad companies operating the connecting lines, providing that the negligence of the plaintiff or his employees or agents contributed thereto.

7. The court instructs the jury that if they shall find from the evidence that the cattle in controversy had been confined in the defendant's cars for a longer period than twenty-eight consecutive hours upon their arrival at Cincinnati, that it was the duty of the defendant to unload them for rest, water, and feeding, and the defendant cannot be made liable for that detention.

8. The court instructs the jury that if injuries were sustained in consequence of causes specified and excepted in the contract of shipment made at East S't Louis, then the burden of proof is upon the plaintiff to show that such injuries were occasioned by the negligence of the defendant.

46 And thereupon, in addition to those already given by the court, it of its own motion gave the following charge to the jury:

Charge to jury.

The contract between the plaintiff and the defendant contemplate' that the owner through his own agents should have the care and custody of the cattle throughout the entire route; that is, the loading and unloading of them at the necessary intervals of rest, food and water—secing that they were properly loaded and unloaded, and properly care' for.

The defendant bound himself to transport safely, if it could be so done through the exercise of ordinary care and diligence on its part.

Ordinarily, you know, gentlemen, a common carrier, that is a railroad, in the absence of a special contract of this kind, is held as an insurer. In other words, nothing that could be prevented by prudence or foresight is he excused from having done. In other words, he must transport the cattle to their destination unless something beyond his power and control prevents it. But that is not this contract. The parties to this suit presented a special contract for the transportation of the cattle in question, and it is for the jury to determine from the evidence whether the cattle were injured or the plaintiff sustained any
damages in consequence of the gross neglect of the defendant or of
47 the connecting railroads. The defendant was bound to exercise
ordinary care and diligence in operating the railroad so as to prevent injury to the cattle arising from delays or otherwise.

By the terms of the contract the care of the cattle devolved on plaintiff and his agents, and not on the defendants. For any injury to the cattle caused by the manner of loading or unloading the same, or by the nature of their habits, not caused by the negligence of the defendant in operating the railroad and cars, the plaintiff cannot recover. That is, if those cattle, from their very nature, among themselves hurt themselves, independent of what the railroad was doing, externally to the cars, the plaintiff cannot recover for that.

The defendant contends that at Parkersburg the plaintiff instead of sending forward the cattle, made a new and independent contract with the Baltimore and Ohio Railroad Company; that for the transportation from Parkersburg to Baltimore the plaintiff made an entirely new contract, and did not go forward under the old contract; that he entered into a new contract with other parties, and under that contract he will have to look to the other parties for redress. But on the other hand, the plaintiff contends that the Baltimore & Ohio Railroad Company refused to permit the cattle to go forward unless the alleged new contract
was signed. If the alleged contract was signed by the plaintiff'
48 agent as the sole means whereby the cattle could go forward, as the
original contract with defendant contemplated, then the signing of that new paper at Parkersburg did not release or discharge the defendant from its obligations to send forward such cattle, as originally agreed, without unreasonable delay.

The original contract was made upon the part of the Ohio & Mississippi Railroad to transport to Philadelphia, for a certain price per car, sixteen car-loads of cattle, the privilege being given to the plaintiff to sell as he pleased at Cincinnati or at Baltimore. Now, the Ohio and Mississippi Railroad took upon itself the sending of the cattle beyond its terminus at Cincinnati, and took the freight for the whole distance, and was bound to see that the cattle ware carried the whole distance. It made the agreement and must see it executed.

Consequently, if, when under that agreement those cars reached Parkersburg, this intermediate road, which was the agent, the Baltimore and Ohio road, refused to take the cattle forward despite the agreement with the Ohio & Mississippi Railroad, unless the plaintiff would sign a paper whereby he would exonerate it from anything that might happen; if then the plaintiff signed or his agent signed the paper under those circumstances, as the only means of getting those cattle forward, that defence avails nothing.

49 The transportation of cattle for long distances has caused for its protection recent legislation by Congress. That legislation requires, under a penalty, that cattle transported over railroads shall, in the absence of unavoidable delays by storm or accident, have a rest for at least five consecutive hours, for each run of twenty-eight hours. In other words, cattle shall not be confined in cars for more than twenty-eight consecutive hours without giving them at least five consecutive hours for rest, food, and water. An act very important, though it is not involved directly in this case. You have heard a great deal about the forty-four hours' run in this case. Every effort to do that is a violation of the express law of the land, unless occasioned by storm or accident.

In the transit from East S't Louis to Baltimore, in obedience to the law of the land, a delay which said law requires is not an unreasonable delay for which the defendant is charg'able. He was bound to obey the law, and that amount of delay is not a reasonable delay, but a required delay. For all such delays as occurred in that run, pursuant to law, he, so far as being amenible to this plaintiff, is justified, for he was bound by law to make such delays, and the plaintiff himself, having custody of the cattle, is subject to a penalty if he transported the cattle for a longer run than twenty-eight hours without giving them, after
50 that, five full hours' rest. So, in computing this question of unreasonable delay, you will bear in mind they were bound to give five consecutive hours for every twenty-eight hours' run.

It is, therefore, for the jury, in the light of said requirements of law, for such delays, to determine whether there was in addition thereto any unreasonable delays caused by negligence on the part of the defendant or the other roads. Take into consideration the distance to be traveled, and the usual and ordinary modes of transportation in such cases. The main question, then, is, whether the cattle were injured from the negligence of the defendant or any of the intermediate lines without the plaintiff or his agents contributing thereto. If both parties contributed to the injury, neither party can recover from the other.

And to the said charge and statement of facts by the court made to the jury, and the several propositions therein announced by the court to the jury as the law of the case, the defendant, by its attorney, then and there severally objected, and the court then and there overruled said objections of the defendant, and to the action of the court in overruling the defendant's objections, and in giving said charge, and declaring said propositions as the law of the case, the defendant,
51 by its counsel, then and there excepted.

Thereupon the jury retired and returned the following verdict:

Verdict.

We, the jury, find for the plaintiff twenty-three hundred dollars.

GEO. R. RATHBURN,
Foreman.

And defendant thereupon, and as often as said action of the court occurred, and said exceptions were made, asked that the same might be noted, and that the defendant's bill of exceptions might and may be allowed and made a part of the record herein, which is accordingly done.

SAMUEL TREAT, *Judge.*

And afterwards, to wit, at said September term, 1874, and on the 27th day of October, 1874, the following proceedings were had in said case, to wit:

JOHN MCCARTHY, PLAINTIFF,
vs.
OHIO & MISSISSIPPI RAILWAY CO., DEFENDANT.
} Removed from circuit court of S't Louis County.

This day comes the defendant, by its attorney, D. W. Paul, esquire, who presents to the court a writ of error to remove this case to the Supreme Court of the United States; also a citation citing and admonishing said plaintiff to be and appear before said Supreme Court at its October term in the year 1875.

Thereupon said writ of error is allowed and said citation signed
52 by the judge; and the bond required on the allowance of said
writ of error having been submitted to the court, the same is approved and ordered to be filed and made a part of the record herein. It is further ordered that a supersedeas be granted, staying further proceedings on the judgment rendered in this case.

And the said supersedeas bond, approved and filed as aforesaid, is in words and figures as follows, to wit:

Bond.

Know all men by these presents, that I, Charles Parsons, of the city and county of S't Louis, and State of Missouri, and the Ohio and Mississippi Railway Company, are held and firmly bound unto John McCarthy, in the full and just sum of three thousand dollars, to be paid to the said John McCarthy, his heirs, executors, administrators, or assigns, to which payment, well and truly to be paid, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 27th day of October, in the year of our Lord one thousand eight hundred and seventy-four.

Whereas, lately, at the September term, A. D. 1874, of the circuit court of the United States for the eastern district of Missouri, in a
suit depending in said court between John McCarthy, plaintiff,
53 and the Ohio and Mississippi Railway Company, defendant, judg-
ment was rendered against the said Ohio & Mississippi Railway Company for the sum of twenty-three hundred dollars, and the said Ohio and Mississippi Railway Company having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said John McCarthy, citing and admonishing him to be and appear at a Supreme Court of the United States at Washington, the second Monday of October next:

Now, the conditions of the above obligation is such, that if the said Ohio and Mississippi Railway shall prosecute said writ to effect, and answer all damages and costs if it shall fail to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

OHIO & MISSISSIPPI RAILWAY COMPANY, [SEAL.]
By H. P. BUXTON, *Its Att'y in Fact.*
CHARLES PARSONS. [SEAL.]

Approved by—

SAMUEL TREAT,
Judge.

54 UNITED STATES OF AMERICA,
Eastern District of Missouri, ss:

I, M. M. Price, clerk of the circuit court of the United States, in and for the eastern district of Missouri, do hereby certify the writing hereto attached to be a true copy of the record and proceedings had in case No. , of John McCarthy, plaintiff, against The Ohio and Mississippi Railway Company, defendant, as fully as the same remain on file and of record in said case in my office.

In witness whereof, I hereunto subscribe my name and affix the seal of said court, at office in the city of S't Louis, in said district, this 25th day of June, in the year of our Lord eighteen hundred and seventy-five.

[SEAL.]

M. M. PRICE,
Clerk of said Court.
BY C. M. WARD, *Deputy.*

(Indorsement on cover:) No. 202. The Ohio and Mississippi Railway Company, plaintiff in error, *vs.* John McCarthy. Filed 13th October 1875.

Supreme Court of the United States.

October Term, 1877– No. 202.

THE OHIO & MISSISSIPPI RAILWAY COMPANY,
Plaintiff in Error.
vs.
JOHN McCARTHY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF THE PLAINTIFF IN ERROR.

G. POLLARD,
D. W. PAUL.
Att'ys for Plaintiff in error.
C. A. BEECHER, *of Counsel.*

ST. LOUIS:
C. R. BARNS, BOOK AND JOB PRINTER, 215 PINE STREET.
1877

Supreme Court of the United States.

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THE OHIO & MISSISSIPPI RAILWAY COMPANY,
Plaintiff in Error.
vs.
JOHN McCARTHY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF MISSOURI.

STATEMENT, ASSIGNMENT OF ERRORS, AND BRIEF OF THE PLAINTIFF IN ERROR.

STATEMENT.

This suit was originally brought by John McCarthy against the Ohio & Mississippi Railway Company, the plaintiff in error, and a corporation existing under the laws of Illinois, in the Circuit Court of St. Louis County, Missouri; and it was by the latter removed to the United States Circuit Court for the Eastern District of Missouri, whence it was by writ of error brought to this court.

The object of the suit was to recover damages, alleged by McCarthy to have been sustained by him in consequence of negligence, carelessness and delay upon the part of the railway company in the forwarding of his cattle.

The action was not on the case, but on the contract of affreightment set forth in McCarthy's petition.

PETITION.

The petition alleges, that the railway company is a corporation incorporated under the laws of Illinois; that it owns and operates a railroad extending from East St. Louis, Illinois, to Cincinnati, Ohio, where it connects with the Marietta and Cincinnati Railroad, which extends to Parkersburg, connecting there with the Baltimore & Ohio Railroad; and that this last extends to Baltimore, and that the Ohio & Mississippi Railway, in connection with the two other railroad companies, was a common carrier for hire, of goods and freight.

That on the 23d day of September, at said East St. Louis, McCarthy delivered to the plaintiff in error, 304 cattle, to be forwarded under a contract then and there executed by and between the parties, which was set forth at length in the petition, and is as follows:

"This agreement made this 23d day of Sept., A. D. 1873, between the Ohio & Mississippi Railway Co., party of the first part, and John McCarthy, party of the second part, witnesseth: That the party of the first part will forward for the party of the second part the following freight, to wit; 16 cars cattle, more or less, from E. St. Louis to Philadelphia, at the rate of $130 per car, which is a reduced rate, made expressly in consideration of this agreement, in consideration of which the party of the second part agrees to take care of said freight while on the trip, and load and unload the same at his or their own risk and expense, and that the party of the first part and connecting lines over which such freight may pass, shall not be responsible for any loss, damage, or injury which may happen to said freight in loading, forwarding or unloading, by suffocation or other injury caused by overloading cars, by escapes from any cause whatever, by any accident in operating the road, or delay caused by storm, fire, failure of machinery or cars, or obstruction of tracks from any cause, or by fire from any cause whatever, or by any other cause except gross negligence; and that the said party of the first part, and such connecting lines, shall be deemed merely forwarders and not common carriers, and only liable for such loss, damage, injury, or destruction of such freight as may be caused by gross negligence only, and not otherwise.

Privilege of selling at Cincinnati or Baltimore.

Witness our hands and seals in duplicate.

[SEAL] OHIO & MISSISSIPPI RAILWAY COMPANY,
By H. COOPE, Agent.
[SEAL] JOHN MCCARTHY.
W. S. Hensley, Phila. Pa."

Vide Record, p. 8.

"That the plaintiff in error failed to forward said cattle to Philadelphia pursuant to its said agreement; and that it and the connecting lines did not safely forward, carry and deliver the cattle pursuant to said agreement; that they did not use ordinary care and diligence in the forwarding, carrying and delivering of said cattle; that the Ohio & Mississippi Railway Company and said connecting lines so carelessly and negligently conducted in regard to the same, that a great number of said 304 cattle became maimed, bruised, crippled, and greatly depreciated in value, and that a great number, to-wit, 20, were killed, through the gross negligence of the defendant and said Marietta & Cincinnati and Baltimore & Ohio Railroads, and their respective agents and servants, and totally lost to this plaintiff."

That none of the injuries were sustained in consequence of the causes excepted in the contract.

In an additional count, damages were claimed for alleged delays on the part of the Ohio & Mississippi Railway Company and its connecting lines in "forwarding and delivering" the cattle, and it was alleged that in consequence of these delays, the cattle hadn't the same marketable value upon their arrival at Baltimore, as they would have had if no delay had taken place. Vide Record, pp. 7-10.

ANSWER.

The plaintiff in error, in answer to the petition, admitted that it was a corporation, and existing as such under the laws of Illinois; that its railroad extended from East St. Louis to Cincinnati, and that it was a common carrier between those points; that its railroad at Cincinnati, among others, connected with that of the Marietta & Cincinnati Railroad Company, and that the road of the latter connected with that of the Baltimore & Ohio Railroad Company; that its freight cars made connections with the freight cars of these other railroad companies; but denied that it was a common carrier farther east than Cincinnati; denied that the two other railroad companies had any interest, ownership of, or control over the cars on its road; and denied that it was a common carrier in connection with the two other railroad companies between East St. Louis and Philadelphia.

It also admitted the execution of the contract, and the reception of the cattle under it on the 23d of September, but denied that that they belonged to the plaintiff; alleged that it furnished suitable cars, and transported the cattle with due care and diligence, in the usual time required therefor; and at Cincinnati—its eastern terminus, known to be such by McCarthy—unloaded the cattle from its cars, and delivered them in accordance with its custom, which was known to McCarthy, in as good condition, as the length of time necessarily consumed in their carriage and the distance traveled admitted, to the Marietta & Cincinnati Railroad Company, in accordance with its custom, and with suitable instructions for the carriage of the cattle the rest of the route.

That McCarthy sold two car-loads of the cattle at Cincinnati.

That the remainder of the cattle, after they had had a suitable time for rest and feed, at Cincinnati, were loaded by the Marietta & Cincinnati Railroad Company in its own cars, and suitable for the purpose, and were then safely and securely carried by it to Parkersburg, where they were by it unloaded and delivered to the Baltimore & Ohio Railroad Company with suitable instructions for their carriage to Baltimore; that the Baltimore & Ohio Railroad Company, after the cattle had been fed and rested sufficiently, loaded them in its own cars, and transported them with due care and diligence to Baltimore, and there delivered them to the consignee, who refused to have them carried to Philadelphia.

That during the whole passage from East St. Louis to Baltimore, the cattle were under the care and supervision of Hensley, their consignee, who accompanied them.

It denied generally, that any cattle had been killed or injured, or any damage sustained in consequence of any acts on its part, or those of either of the other railroad companies; and alleged that if any damage had been sustained, it was due to causes over which it had no control, and for which under the contract it was stipulated, that it should not be held responsible.

It also denied that there had been any unusual or unnecessary delay in the transportation of the cattle.

And for a further defence, the plaintiff in error alleged that the defendant in error, upon the arrival of the cattle at Parkersburg, abandoned and repudiated the contract executed at East St. Louis, and executed a new contract for the transportation of the cattle the rest of the way to Philadelphia, with the Baltimore & Ohio Railroad Company; (vid Record, pp. 13 and 14), and that the cattle were transported from Parkersburg to Baltimore under, and subject to that, and set forth the same in its answer.

Vide Record, pp. 10–15.

REPLICATION.

The defendant in error replied, denying that the various railroad companies transported the cattle without any unusual delay.

And denied that the cattle were carried from Parkersburg to Baltimore under the contract there executed, and alleged that it was signed under protest, and as the sole means by which he could get his cattle carried by the Baltimore & Ohio Railroad Company.

Record, pp. 15 and 16.

The case was tried before a jury.

EVIDENCE.

And the evidence introduced, showed that 304 cattle were received to be forwarded by the plaintiff in error under the contract, on Tuesday, September 23, at East St. Louis; that they were loaded in 16 good cars belonging to the plaintiff in error, and went forward under the care and supervision of the consignee, W. S. Hensley, and one Pat Bellew; that they arrived in Cincinnati on Thursday, September 25th, where they were delivered to the Marietta & Cincinnati Railroad Company, the next connecting railroad company; that Hensley there selected 42 of the cattle and sold them.

The Marietta & Cincinnati Railroad Company on the next day, Friday, loaded the cattle remaining unsold, in cars of its own, suitable for the purpose, and transported the cattle to Parkersburg, its eastern terminus, arriving there on Saturday, September 26th. It there delivered them to the Baltimore & Ohio Railroad Company, and the cattle remained there over Sunday.

On Saturday Hensley requested the agent of the Baltimore & Ohio Railroad Company, to send out his cattle from Parkersburg on Sunday morning, as he wished to arrive in Baltimore on Tuesday morning, in time for the market of that day. This the agent refused to do.

On Monday morning the cattle were loaded in suitable cars belonging to the Baltimore & Ohio Railroad Company, and were by it transported to Baltimore, where they arrived at a seasonable hour on Wednesday morning, October 1st. That on Wednesday morning there was a decline from Tuesday's prices of five dollars per head.

Hensley signed the contract executed at Parkersburg with the Baltimore & Ohio Railroad Company, because it would not carry the cattle, unless he did so, and he did so "because he had no other way of getting the cattle to Baltimore except by driving." Record pp. 19 and 20, § 41.

In addition to the above facts, which are uncontradicted by other testimony, the defendant in error introduced evidence tending to show that during the passage of the cattle from East St. Louis to Baltimore, there were delays and accidents caused by the incompetence of the employees of the different carriers, and that the cattle were injured in consequence thereof.

On the other hand, the testimony introduced on behalf of the plaintiff in error, tended to show, that the cattle were transported in the usual time required for that purpose: that the employees of the various companies were careful and competent men; that good machinery was used, and that the cattle arrived in Cincinnati and Baltimore in as good condition as a carriage of cattle that distance by rail permitted.

That the cattle were not sent out from Parkersburg by the Baltimore & Ohio Railroad Company on Sunday, because it had not the requisite cars on that day, but sent them out at the first opportunity, viz., on Monday morning.

As to the ownership of the cattle, the defendant in error testified, "William S. Hensley, besides myself, was interested in the cattle. He had a half interest in the profits, I was the owner." This was all the testimony given on that point. Record, pp. 18–20.

INSTRUCTIONS.

The testimony was submitted to the jury under the following instructions given by the Court at the instance of the plaintiff in error.

"The Court instructs the jury that the plaintiff can not recover for such injuries as the cattle sustained through the negligence of the defendant or of the other railroad companies operating the connecting lines, providing that the negligence of the plaintiff or his employees or agents contributed thereto.

"The Court instructs the jury that if they shall find from the evidence, that the cattle in controversy had been confined in the defendant's cars for a longer period than twenty-eight consecutive hours upon their arrival at Cincinnati, that it was the duty of the defendant to unload them for rest, water and feeding, and the defendant cannot be made liable for that detention.

"The Court instructs the jury that if injuries were sustained in consequence of causes specified and excepted in the contract of shipment made at East St. Louis, then the burden of proof is upon the plaintiff to show that such injuries were occasioned by the negligence of the defendant."

In addition, upon its own motion, the Court charged the jury as follows:

CHARGE TO JURY.

"The contract between the plaintiff and the defendant contemplates that the owner through his own agents should have the care and custody of the cattle throughout the entire route; that is, the loading and unloading of them at the necessary intervals of rest, food and water—seeing that they were properly loaded and unloaded and properly cared for.

"The defendant bound itself to transport safely, if it could be so done through the exercise of ordinary care and diligence on its part.

"Ordinarily, you know, Gentlemen, a common carrier, that is, a railroad, in the absence of a special contract of this kind, is held as an insurer. In other words nothing that could be prevented by prudence or foresight is he excused from having done. In other words, he must transport the cattle to their destination unless something beyond his power and control prevents it. But that is not this contract. The parties to this suit presented a special contract for the transportation of the cattle in question, and it is for the jury to determine from the evidence whether the cattle were injured or the plaintiff sustained any damages in consequence of the gross neglect of the defendant or of the connecting railroads. The defendant was bound to exercise ordinary care and diligence in operating the railroad so as to prevent injury to the cattle arising from delays or otherwise. By the terms of the contract the care of the cattle devolved on plaintiff and his agents, and not on the defendants. For any injury to the cattle caused by the manner of loading or unloading the same, or by the nature of their habits, not caused by the negligence of the defendant in operating the railroad and cars, the plaintiff can not recover. That is, if those cattle, from their very nature, among themselves, hurt themselves independent of what the railroad was doing, externally to the cars, the plaintiff can not recover for that.

"The defendant contends that at Parkersburg the plaintiff, instead of sending forward the cattle, made a new and independent contract with the Baltimore & Ohio Railroad Company; that for the transportation from Parkersburg to Baltimore, the plaintiff made an entirely new contract, and did not go forward under the old contract; that he entered into a new contract with other parties, and under that contract he will have to look to the other parties for redress. But on the other hand, the plaintiff contends that the Baltimore & Ohio Railroad Company refused to permit the cattle to go forward unless the alleged new contract was signed by the plaintiff's agent as the sole means whereby the cattle would go forward, as the original contract with defendant contemplated, then the signing of that new paper at Parkersburg did not release or discharge the defendant from its obligations to send forward such cattle, as originally agreed, without unreasonable delay.

"The original contract was made upon the part of the Ohio & Mississippi Railroad to transport to Philadelphia, for a certain price per car, sixteen car loads of cattle, the privilege being given to the plaintiff to sell as he pleased at Cincinnati or at Baltimore. Now, the Ohio & Mississippi Railroad took upon itself the sending of the cattle beyond its terminus at Cincinnati, and took the freight for the whole distance, and was bound to see that the cattle were carried the whole distance. It made the agreement and must see it executed. Consequently, if, when under that agreement those cars reached Parkersburg, this intermediate road, which was the agent of the Baltimore & Ohio road, refused to take the cattle forward despite the agreement with the Ohio & Mississippi Railroad, unless the plaintiff would sign a paper whereby he would exonerate it from anything that might happen; if then the plaintiff signed or his agent signed the paper under those circumstances, as the only means of getting those cattle forward, that defence avails nothing.

"The transportation of cattle for long distances has caused for its protection recent legislation by Congress. That legislation requires, under a penalty, that cattle transported over railroads shall, in the absence of unavoidable delays by storm or accident, have a rest for at least five consecutive hours, for each run of twenty-eight hours. In other words, cattle shall not be confined in cars for more than twenty-eight consecutive hours without giving them at least five consecutive hours for rest, food and water. An act very important, though it is not involved directly in this case. You have heard a great deal about the forty-four hours run in this case. Every effort to do that is a violation of the express law of the land, unless occasioned by storm or accident. In the transit from East St. Louis to Baltimore in obedience to the law of the land, a delay which said law requires, is not an unreasonable delay, for which the defendant is chargeable. He was bound to obey the law, and thatamount of delay is not a reasonable delay, but a required delay. For all such delays as occurred in that run, pursuant to law, he, so far as being amenable to this plaintiff, is justified; for he was bound by law to make such delays, and the plaintiff himself, having custody of the cattle, is subject to a penalty if he transported the cattle for a longer run than twenty-eight hours without giving them, after that, five full hours rest. So, in computing this question of unreasonable delay, you will bear in mind they were bound to give five consecutive hours for every twenty-eight hours run.

"It is, therefore, for the jury, in the light of said requirements of law, for such delays, to determine whether there was in addition thereto, any unreasonable delays, caused by negligence on the part of the defendant or the other roads. Take into consideration the distance to be traveled, and the usual and ordinary modes of transportation in such cases. The main question, then, is whether the cattle were injured from the negligence of the defendant or any of the intermediate lines without the plaintiff or his agents contributing thereto. If both parties contributed to the injury, neither party can recover from the other." Record pp. 21-23.

INSTRUCTIONS ASKED BY THE PLAINTIFF IN ERROR AND REFUSED BY THE COURT.

The court refused the following instructions asked by the plaintiff in error.

1. "The court instructs the jury that the plaintiff can not recover damages for such loss, damage or injury as was sustained by his cattle by loading, forwarding or unloading; by suffocation or other injury caused by overloading cars; by escapes from any cause whatever; by any accident in operating the road, or delay caused by failure of machinery or cars or obstruction of track from any cause except gross negligence, or from any cause not occasioned by gross negligence on the part of the Ohio & Mississippi Railroad Company or the Marietta & Cincin-

nati Railroad Company, or the Baltimore & Ohio Railroad Company."

2. "The court instructs the jury that under the contract made by the plaintiff with the defendant, the plaintiff can only recover for such injuries or damages as the cattle sustained before they passed into the possession of the Marietta & Cincinnati Railroad Company."

3. "The court instructs the jury that the plaintiff can not recover for such injuries as his stock sustained after they passed into the possession of the Baltimore & Ohio Railroad Company at Parkersburg."

4. "The court instructs the jury that it was not the duty of the defendant, or its connecting line, the Baltimore & Ohio Railroad Company, to start out from Parkersburg on Sunday with the plaintiff's cattle, and that the plaintiff cannot recover damages for failure to do so."

5. "The court instructs the jury that they must find for the defendant, unless they shall believe from the evidence that the plaintiff was the sole owner of the cattle in controversy; and that if they shall believe from the evidence that W. S. Hensley was a part owner of the cattle, or in the proceeds thereof, that they must find for the defendant." Record pp. 20–21.

To the charge of the court and statements of facts therein, and the action of the court in refusing its instructions Nos. 1, 2, 3, 4 and 5, the plaintiff in error excepted.

The jury gave a verdict for the defendant in error, to recover $2300, under the above evidence, charge, and such of the instructions as were granted by the court.

II.

ASSIGNMENT OF ERRORS.

1. The court erred in refusing the following instruction asked by the plaintiff in error, viz.: "The court instructs the jury that they must find for the defendant, unless they shall believe from the evidence that the plaintiff was the sole owner of the cattle in controversy; and that if they shall believe from the evidence that W. S. Hensley was a part owner of the cattle, or in the proceeds thereof, that they must find for the defendant. Record p. 21, § 44, Instruction No. 5.

2. The court erred in refusing to instruct the jury "that under the contract made by the plaintiff with the defendant, the plaintiff can only recover for such injuries or damages, as the cattle sustained before they passed into the possession of the Marietta and Cincinnati Railroad Company": as requested by the plaintiff in error. See Record p. 21, § 44, Instruction No. 2.

3. The court erred in charging the jury that, "The original contract was made upon the part of the Ohio & Mississippi Railroad to transport to Philadelphia, for a certain price per car, 16 car loads of cattle, the privilege being given to the plaintiff to sell at Cincinnati or at Baltimore. Now, the Ohio & Mississippi Railroad took upon itself the sending of the cattle beyond its terminus at Cincinnati, and took the freight for the whole distance, and were bound to see that the cattle were carried the whole distance. It made the agreement and must see it executed." Record p. 22. § 48. Wherein it defined the duties and obligations of the plaintiff in error, as those of a common carrier beyond the terminus of its road, whereas, it at the most under the contract of ship-

ment was only a common carrier over its own road, and a mere forwarder the rest of the route.

4. The court erred in refusing to instruct the jury, "That the plaintiff cannot recover for such injuries as his stock sustained after they passed into the possession of the Baltimore and Ohio Railroad Company at Parkersburg," as requested by plaintiff in error. Vide Record p. 21; Instruction No. 3.

5. The court erred in its charge respecting the contract executed at Parkersburg, which was as follows: "If the alleged contract was signed by the plaintiff's agent as the sole means whereby the cattle could go forward, as the original contract with defendant contemplated, then the signing of that new paper at Parkersburg did not release or discharge the defendant from its obligations to send forward such cattle, as originally agreed, without unreasonable delay." * * * * * "Consequently, if when under that agreement those cars reached Parkersburg, this intermediate road, which was the agent of the Baltimore and Ohio road, refused to take the cattle forward despite the agreement with the Ohio & Mississippi Railroad, unless the plaintiff would sign a paper whereby he would exonerate it from anything that might happen; if, then, the plaintiff signed or his agent signed the paper under those circumstances, as the only means of getting those cattle forward, that defence avails nothing." Record p. 22, § 48.

6. The court erred in refusing to instruct the jury, "That it was not the duty of the defendant, or its connecting line, the Baltimore and Ohio Railroad Company, to start out from Parkersburg on Sunday with the plaintiff's cattle, and that the plaintiff cannot recover damages for failure to do so," as requested by the plaintiff in error. Vide Record p. 21, § 44, Instruction No. 4.

III.

BRIEF.

I.

As the title to the cattle was put in issue by the pleadings—vide Record, p. 11, § 20—it devolved upon McCarthy to prove his ownership of them.

The statutes of Missouri required that this action should have been prosecuted in the names of the real parties in interest.

"Parties who are united in interest must be joined as plaintiffs or defendants." Wag. Stat. of Mo., p. 1001, § 6.

As the forms and modes of proceedings of the various State Courts had previously been adopted in the Federal Courts, the statutes of Missouri applied in this case at this time. And it was necessary for McCarthy to prove that he alone was entitled to a judgment for damages.

The only testimony on this point was given by McCarthy, and was as follows:

"William S. Hensley, besides myself, was interested in the cattle. He had a half interest in the profits. I was the owner." Record, p. 20, § 41.

The following instruction, No. 5, was asked by the railway company and refused by the court:

"The Court instructs the jury that they must find for the defendant, unless they shall believe from the evidence, that the plaintiff was the sole owner of the cattle in controversy, and that if they shall believe from the evidence that W. S. Hensley was a part owner of the cattle, or in the proceeds thereof, that they must find for the defendant." Record 21, § 44.

The court erred in refusing this instruction, inasmuch, as whether McCarthy was the sole owner of the cattle, or

Hensley a joint owner with him, were questions of fact, material to the case, and should have been submitted to the jury under the above, or some similar instruction.

II.

2. If, however, it be assumed, that McCarthy was the sole owner of the cattle, and alone entitled to bring the suit for such damages as was sustained by any breach of the contract; then the plaintiff in error insists that its rights and duties were not properly defined by the court in the charge to the jury.

The court used the following language: "The original contract was made upon the part of the Ohio & Mississippi Railroad to transport to Philadelphia, for a certain price per car, sixteen car loads of cattle, the privilege being given to the plaintiff to sell as he pleased at Cincinnati or at Baltimore. Now, the Ohio & Mississippi Railroad took upon itself the sending of the cattle beyond its terminus at Cincinnati, and took the freight for the whole distance, and was bound to see that the cattle were carried the whole distance. It made the agreement and must see it executed." Record, p. 22, § 48.

The court also erroneously refused to instruct the jury, on behalf of the Railway Company, "that under the contract made by the plaintiff with the defendant, the plaintiff can only recover for such injuries or damages, as the cattle sustained before they passed into the possession of the Marietta & Cincinnati Railroad Company." Record, p. 21, § 44, Instruction 2.

The instruction refused would if granted have limited the liabilities of the railway company to that of forwarder, while the charge of the court made it a common carrier, with some restrictions, the whole of the route from East St. Louis to Baltimore.

The Eastern terminus of the Ohio & Mississippi Railway was at Cincinnati. There it connected with the Marietta & Cincinnati Company's track, and this last with that of the Baltimore & Ohio Railroad Company at Parkersburg. It was alleged in the answer to McCarthy's petition, that Cincinnati was the Eastern terminus of the Ohio & Mississippi Railway, and that this was known to McCarthy." Vide Record, p. 11, § 21.

Also that the cattle were delivered in accordance with the custom of the Ohio & Mississippi Railway Company to the Marietta & Cincinnati Railroad, which custom was well known to McCarthy, and this was not denied by him in his replication. Vide Record, pp. 15-16. It therefore stands admitted, that he knew where its road terminated and he therefore must have known when he made the shipment that the cattle would necessarily pass into the possession and control of the Marietta & Cincinnati Railroad Company, and out of the possession of the plaintiff in error, at Cincinnati. These three railroads were under different managements, and the cattle were carried in the cars belonging to and under the sole control of that particular railroad over which they happened to be passing There was no allegation or proof made, that any freight was paid to the plaintiff in error, or either of the other railroad companies; nor whether the Baltimore & Ohio Railroad Company was to collect the freight and distribute to each of the railroads a pro rata share; nor that there was any such usage, custom of, or dealings among the various railroad companied, as constituted a partnership relation between them.

In the absence of any special contract, the plaintiff in error was only bound to carry the cattle safely and securely over its own road, and at Cincinnati to deliver them to the Marietta & Cincinnati Railroad Company with suitable directions for the carriage of the cattle the rest of the way.

Railroad Company v. Manufacturing Co., 16 Wall. 318.

Railroad Company v. Pratt, 22 Wall. 123.

With the exception of the risks occurring on its own railroad, the plaintiff in error stipulated that it should merely be held liable as it would have been at common law, in the absence of any contract. This contract then was valid and it contracted to "forward" for McCarthy sixteen cars of cattle from East St. Louis and that it should be deemed "*forwarders*" *and not* "*common carriers.*" Vide Record, p. 8.

If by the contract the plaintiff in error was a mere forwarder, its instruction No. 2, asked by it should have been given, and that part of the charge above referred to was erroneous.

McCarthy bases his suit on the contract, and claims only such damages as were occasioned by a breach of this contract, and not for any violation of duties on the part of the plaintiff in error as common carrier.

The forwarding of the cattle was undertaken at less rates than their carriage would have been, had the liabilities of an insurer attached, and McCarthy thereby got the benefit of reduced rates.

The contract was mutual, and was therefore, only so far as it tended to diminish the responsibility cast upon the plaintiff in error by common law, to be construed as much in favor of the railway company as McCarthy.

If however had instruction No. 2, p. 21, § 44, refused by the Court, been given, it would have correctly defined the liability of the plaintiff in error. It is admitted by the pleadings, that the Ohio & Mississippi Railway Company gave suitable instructions to the Marietta & Cincinnati

Railroad Company when the cattle were delivered by it to the latter.

The distinction between the duties and liabilities of a "common carrier" and those of a forwarder are known to every business man and especially to shippers of cattle.

"Transported or carried are equivalent terms and quite distinct from the idea of forwarding."

Railroad v. Pratt, 22 Wall. 133.

"If the carrier undertake to forward the goods beyond the line of his own carriage, and on their arrival at the termination of his own route, he puts them into a proper vehicle for such farther conveyance, having no interest therein, or hire therefor, his duty is completely discharged as carrier, and he is not responsible for any subsequent loss of the goods."

Story on Bailments, p. 386 § 448 (8th ed.)

Reed vs. United States Express Company, 48 N. Y. 462, is a case resembling this. There the plaintiff, at Chicago, delivered to the defendant a package of money for transmission to Georgia. For this package the Express Company gave the following receipt: "Received of Peter Reed, one package, &c., &c., which we undertake to forward to Dalton, perils of navigation excepted; and it is hereby expressly agreed that the United States Express Company are not to be held liable for a loss or damage, except as forwarders only." The Express Company carried this package to New York, and, as it had no route south of there, delivered it to the Adams Express Company for carriage the remainder of the way to Georgia. This last express company failed to deliver the package to the consignee, and suit was brought by Reed against the United States Express Company. The Express Company relied on its receipt for defence, and claimed that under that, it was only a forwarder and its duty was discharged when it delivered the package to the Adams Express Company. The court ruled otherwise, and judgment was rendered for the plaintiff. This judgement of the inferior court was reversed by the Appellate Court and judgment rendered for the defendant.

The judge delivering the opinion says: "My conclusion is that, by the contract, the defendant undertook to carry the package over its own line and to forward, or in equivalent language, send it from the termination of its line, in the same condition it was received, by a connecting route; all of which was done by the safe delivery of the package to the Adams Express Company with suitable directions."

The doctrine laid down in this case is approved by Appleton C. J, in his opinion rendered in Inhabitants of Plantation No. 4, R. I. vs. Hall et al., 61 Me. p. 519.

In the case of Hooper vs. Wells, Fargo & Co., 27 Cal., p. 40, the defendants undertook not only "to forward," but "to deliver" at San Francisco, a sum of money; and the words "to deliver" were held to control the contract and to cast upon the Express Company the liabilities of a common carrier. There are other cases against express companies and carriers, where in the contract some clauses, like the one above quoted, are held to control the contracts, that would have otherwise made the Express companies mere forwarders.

But the cases of express companies are, in many respects, different from the present one. For, although they seldom own the vehicles in which the freight is carried, and have no control over trains, still they send messengers in charge of the freight carried, and have local agents at the place of destination, who in person, deliver the property carried to the consignee.

Then too, in some cases, the prepayment of the whole freight money to the place of destination has, where the contract was ambiguous, been taken as exercising an important bearing in the construction of the contract. Here, no freight money was paid, and there was no ambiguity in the contract. The plaintiff in error contracted "to forward" and that it should be deemed merely a "*forwarder*" only, and this was agreed to by the defendant in error, as his signature witnesses.

III.

Upon the arrival of the cattle at Parkersburg, Hensley, their consignee, who went in charge of them, executed a new contract for their carriage the remainder of the way. This he, at first, refused to sign; but when told that the Baltimore & Ohio Railroad Company would not carry the cattle unless he did so, he signed it under protest, and because he had no other way of getting the cattle to Baltimore than by driving. Vide Record p. 19 § 41.

The plaintiff in error asked the court to instruct the jury that McCarthy could not recover for such injuries as his stock sustained after they passed into the possession of the Baltimore & Ohio Railroad Company at Parkersburg. Vide Record p. 21, § 44. This was refused.

The court of its own motion charged that "if the alleged contract was signed by the plaintiff's agent as the sole means whereby the cattle could go forward, as the original contract with defendant contemplated, then the signing of that new paper at Parkersburg did not release or discharge the defendant from its obligations to send forward such cattle as originally agreed, without unreasonable delay; and also instructed the jury that the Baltimore & Ohio Railroad was the agent of the Ohio & Mississippi Railroad.

The action of the court in refusing the instruction asked, and in giving that part of the charge quoted, was erroneous, whether the plaintiff was a mere forwarder, or common carrier, over the route east of Cincinnati.

Hensley was both the plaintiff's agent, and consignee of the cattle, and in either capacity, had the right of removing the stock, or receiving the stock before it reached Baltimore; and could make new contracts for its carriage.

The execution of the last was a repudiation and abandonment of the first contract. In the second contract, entirely different stipulations were inserted, a new rate agreed upon, and a complete indemnity extended to the Baltimore & Ohio railroad against any loss or liability, also against all suits that might be brought against it or which might arise from the transportation of the stock. Hensley might at Parkersburg, by telegraph, have easily notified the plaintiff in error of his situation, and asked for instructions or assistance, but there is no evidence that he endeavored to do so.

No duress was exercised. In United States and Lyon vs. Huckabee, 16 Wall, 432, it is held that positive menace of battery to the person, or of trespass to lands, or of destruction of goods, may enable one to avoid a contract upon proof of such facts. But no such cause can be given in this case. He had complete control over the cattle, and there is no pretense that Hensley could not have taken possession of the cattle, and removed them out of the custody of the Baltimore & Ohio Railroad Company whenever he pleased. The only reason that Hensley gave for signing the contract was, that unless he had done so, he should have been compelled to drive the cattle to Baltimore. In other words he signed the contract merely for the purpose of avoiding an inconvenience.

"To constitute duress, there must be a seizure of the property or the arrest of the person, or a threat or attempt to do one or the other, or facts must be stated which tend to show, or which warrant the conclusion that such arrest or seizure could be avoided only by the payment of the sum demanded."

Wolfe, *et al.*, vs. Marshal, *et al.*, 52 Mo. 170.
Claflin *et al.*, vs. McDonough, 33 Mo. 415.

The contract executed at East St. Louis was not recognized by the Baltimore & Ohio Railroad Company, and the evidence clearly establishes, that the cattle were not carried under that by the Baltimore & Ohio Railroad Company, but under the one executed at Parkersburg.

If then the Ohio & Mississippi Railway Company is "deemed a *common carrier*, and not a mere forwarder," the whole distance to Baltimore, a complete breach of the contract took place at Parkersburg. And McCarthy can not recover in this suit, brought on the contract executed at East St. Louis, for losses sustained by the carriage of the cattle under an entirely different contract, executed by the Baltimore & Ohio Railroad Company.

IV.

The plaintiff in error asked the court to instruct the jury that it was not the duty of the Baltimore & Ohio Railroad Company to start out from Parkersburg on Sunday with McCarthy's cattle, and that he could not recover damages for failure to do so. Vide Record p. 21, § 44, Ins. 4. This the court erroneously refused to do, and it did not give an equivalent, nor any instruction respecting the duty of the railroad to run or not to run trains on Sunday.

The cattle arrived in Parkersburg Saturday evening, September 26th, and remained there until Monday morning. Hensley requested the agent of the Baltimore and Ohio Railroad Company to send them out the next (Sunday) morning. The agent refused to do so. Through this failure of the Baltimore & Ohio Railroad Company to send out the cattle on Sunday morning, they did not arrive in Baltimore until Wednesday morning. Had they left on Sunday morning, they would have arrived in time for sale on Tuesday morning, when they could have been sold for five or six dollars more per head than they could have been on Wednesday. On Tuesday was the retail market, and on Wednesday the wholesale market at Baltimore.

There is no proof, that Hensley told the agent, that Tuesday was a better market day than Wednesday, nor that he pretended that there was any necessity for his arriving with the cattle at Baltimore on Tuesday, rather than Wednesday. The largest part of the damage was awarded to McCarthy, in consequence of this refusal of the Baltimore & Ohio Railroad Company to violate the Sabbath, and the laws of West Virginia.

The Code of West Virginia provides that "If a person, on a Sabbath day, be found laboring at any trade or calling, or employ his minor children, apprentices or servants in labor, or other business, except in household or other work of necessity or charity, he shall be fined not less than five dollars for each offense. And every day any such minor child, or servant, or apprentice is so employed shall constitute a distinct offense."

Code of West Va. 1868, p. 694, Chap. 149, § 16.

"No forfeiture shall be incurred under the preceding section for the transportation on Sunday of the mail, or of passengers and their baggage." Id. p. 695, Chap. 149, § 17.

"The word person includes corporations, if not restricted by the context." Id. p. 93, Chap. 13, § 9.

Section 17 indicates that it was not the intention of the Legislature to except railroad companies from the provisions of the above statute, farther than as to the carriage of mails, passengers and their baggage. It is humbly submitted that it has never yet been adjudged necessary for carriers to violate the Sabbath, and the laws of the land, for the purpose merely of guarding against the vicissitudes of a cattle market.

In case of Pate vs. Wright et al., 30 Ind. 476, it was held that the delivery of a quantity of flour on board a steamboat on Sunday, for the purpose of avoiding the liability of delay in getting it to market, occasioned by danger of the closing of navigation, was not a work of necessity, that required a performance on Sunday.

The judge delivering the opinion says "If the vicissitudes of trade and speculation were allowed to fix the rule as to what are works of necessity, there could be no observance of the Sabbath." And the following instruction given by the inferior court was approved: "When parties enter into a contract to be performed on Sunday by the common labor of the party required to perform and his employees, the contract as to performance on Sunday is illegal and void, and neither of them can maintain an action against the other arising out of said contract in respect to its non-performance on Sunday." Id. p. 479.

The case of Powhatan Steamboat Co. v. Appomattox Railroad Co. 24 How. 247, is directly in point. There it appears that a Steamboat Company ran a line of steamers from Baltimore to Richmond, stopping at City Point, and all goods received by it at Baltimore, that were directed to Petersburg, it carried to City Point, and there delivered them to a railroad company for carriage the rest of the way. One of its boats leaving on Saturday, received at Baltimore some goods for carriage to Petersburg. These goods it on the next day, Sunday, delivered to the railroad company at City Point, for carriage the rest of the way. On the same day of their reception, while they were in the possession of the railroad at its warehouse, these goods were destroyed by fire. The owner of the goods brought suit and recovered damages against the steamboat company for the loss thereof; and the latter in turn brought a suit against the railroad Company. The latter set up as a defence, that the goods were delivered and received in violation of the statutes here quoted, and now in force in West Virginia. But the court held that so long as the goods had been delivered and received on Sunday, that it was the duty of the railroad company to take care of the goods, even if the law had been violated by their reception, and that afterwards such care was a work of necessity, and not a violation of the statutes. But it was at the same time asserted, that "if the action was one to recover a compensation for the labor of landing and depositing the goods or to recover damages for refusal to comply with the agreement to open and close the warehouse, the rule of law invoked by the defendants would apply." p. 255. * *

"On the theory assumed, the defendants might have refused to open the warehouse, or to allow the goods to be deposited: and if they had done so, no action could have been maintained against them for the refusal." Id., p. 256.

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Supreme Court of the United States.

October Term, 1877.—No. 202.

THE OHIO & MISSISSIPPI RAILWAY COMPANY,
Plaintiff in Error.

vs.

JOHN McCARTHY,
Defendant in Error.

Error to the Circuit Court of the United States for the Eastern District of Missouri.

STATEMENT AND BRIEF, AND ARGUMENT OF COUNSEL FOR THE DEFENDANT IN ERROR.

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STATEMENT.

This is an action brought by McCarthy, the defendant in error, against the railway company, plaintiff in error, for damages for the mal-performance of a contract of affreightment made by the railway company for the carrying of sixteen car-loads of cattle for McCarthy from East St. Louis to Philadelphia. Upon a trial in the Circuit Court there was a verdict followed by a judgment for McCarthy the plaintiff in that court, to reverse which, the railway company has brought the case to this court by writ of error.

The errors assigned by the plaintiff in this court relate exclusively, as will be seen, to the action of the court below *in charging the jury* and *in refusing instructions* asked by the plaintiff in error. No objection is urged to the form of the action, or to the pleadings in the cause; nor is it complained that the evidence is not sufficient to support the verdict; or that the court in any wise erred in the admission or exclusion of testimony offered on the trial.

In the discussion of the questions raised in the case we propose to follow the order laid out and adopted by the plaintiff's counsel in their printed brief.

I.

The plaintiff complains [plaintiff's printed brief, p. 16] of the court's refusal to instruct that McCarthy could not recover unless he was sole owner of the cattle.

There are two sufficient answers at hand to this complaint: *First*, There was no evidence in the cause on which to base the instruction. The evidence all showed McCarthy was owner, and there was absolutely nothing tending to show ownership in any other. McCarthy testified (and he was the only witness on the subject) that *he was the owner*,—that Hensly had an interest in the *profits*. Courts are not warranted in giving a hypothetical instruction when there is no evidence to support the hypothesis. *Second*, The contract was made by and with McCarthy in his own name; and even if made for the benefit of another it is well settled he may sue alone.

Taylor vs. Steamer Robert Campbell, 20 Mo. R., 259.

Cothay vs. Fennell, 21 E. C. L., 146.

II.

The court, in its charge, directed the jury that by the terms of the contract set out in the petition and admitted by the answer, the Ohio & Mississippi Railway Company was bound to carry the whole distance and beyond its terminus. And refused to give instruction No. 2, limiting the carrier's liability to injuries to the cattle before they passed out of the hands of the first carrier.

The contract which lies at the bottom of this litigation was in writing, and is set out in *hæc verba* in the petition [printed record, p. 8]. And its obligation upon plaintiff is expressly admitted in the answer [printed record, p. 11; manuscript record, p. 20].

The contract being in writing, and its terms being admitted by the parties, its construction,—its legal effect and operation is for the court. The court construed the contract to be a contract to carry the whole distance and not a contract to carry to the terminus of the plaintiff's road, and then "forward."

That it was *competent* for the plaintiff in error to bind itself as carrier beyond its own line ought not any longer be questioned.

Railroad vs. Pratt, 22 Wall., 123.

The only openquestion is whether this contract had that operation.

To prove that it was a contract to forward and not a contract to carry, resort is had by the plaintiff's counsel to certain phraseology employed in the instrument.

The undertaking of the plaintiff is that it "will *forward* * * * sixteen cars of cattle * * * from East St. Louis to Philadelphia," [printed record, p. 8], and it is stipulated that the plaintiff and connecting lines "shall be deemed merely forwarders and not common carriers."

The word "forward" is not a technical term, and it must therefore be understood and construed in the sense in which the parties used it. It is manifest that it was the intention of the parties that the cattle were to move from East St. Louis, and were to reach Philadelphia; and the obligation of the plaintiff to bring about the intended result was expressed by the word "forward." It was only in the sense of carry, or convey, or transport that the operation contemplated, and expressed by the word "forward" could be effected, and the parties therefore must have used the word in that sense.

If the obligation of the plaintiff to forward was to perform the duties merely of a forwarder in the strict sense of the term—that is, to deliver the goods at the end of one line to the next connecting line of carriers, it is plain there was no provision in the contract for getting the goods from East St. Louis to Cincinnati; none for getting them from Cincinnati to Parkersburg, and none from Parkersburg to Baltimore, and the result would be that the goods could never, under this contract, reach their destination.

If the contract was a contract to carry, as we have attempted to show, the plaintiff's character of carrier cannot be divested by the stipulation that it shall be *deemed* a forwarder merely. The nature of the duties to be performed by the plaintiff, and not the name the parties may choose to give to it, is the test of its character. To call it a forwarder, when performing the duties of carrier, does not make it a forwarder, nor divest it of its character of carrier.

It stands admitted by the plaintiff on the record that the contract was a contract for transportation, at least from E. St. Louis to Cincinnati; that the consideration to be paid was *for transportation*, and that the plaintiff transported the goods *under the contract* set out in the petition from E. St. Louis to Cincinnati. [Printed record, p. 11, script p. 20.]

If the contract created an obligation to carry from E. St. Louis to Cincinnati, as the plaintiff has on the record admitted, it likewise imposed the obligation to carry from Cincinnati to Philadelphia, for the same terms are employed to express the obligation to carry over every part of the entire route as over the particular part—the plaintiff and connecting lines "*will forward* * * * from E. St. Louis to Philadelphia."

Hooper vs. Wells, Fargo & Co., 27 Cal. R., 11.

The price stipulated for—$130 per car—was the price for the entire distance, The plaintiff having accepted the price for transportation the entire distance will be held to have assumed the burden of carrier the entire distance.

Root vs. Great Western Railway Co., 45 N.Y., 524.

The plaintiff being then a common carrier with liabilities limited by its contract, and being bound to carry the shipment the whole distance, the court committed no error in so instructing and charging the jury, and in refusing to instruct as asked, that the plaintiff was a mere forwarder.

III.

The plaintiff's third complaint [plaintiff's brief, p. 22,] concerns—*first*, the refusal of the court to give plaintiff's instruction No. 3, [printed record, p. 21, script, 44,] and *second*, the charge of the court in respect to a special agreement entered into at Parkersburg between the Baltimore & Ohio R. R. Co. and W. S. Hensley, the defendant's agent in charge of the cattle.

The following is so much of the answer as sets up the defense based upon said special agreement. It is alleged [printed record, p. 13, script, 27,] that on the arrival of the cattle at Parkersburg, "to-wit, on the 29th day of September, 1873, the plaintiff (defendant in error) *by his authorized agent*, the said Hensley, entered into a contract in writing with the Baltimore & Ohio Railroad Company aforesaid, for the transportation by it of said cattle from Parkersburg to Philadelphia, which said contract is in the following words and figures, to-wit:"

[Here follows the contract in *hæc verba*, printed record, pp. 13, 14 and 15].

"That said cattle were transported from said Parkersburg by the said B. & O. R. R. Co. under and in pursuance of said last mentioned contract, and not under and in pursuance of the contract set forth in said petition, whereby and by reason whereof the defendant (plaintiff in error) became and was released from all liability for or on account of said cattle after their delivery to said B. & O. R. R. Co. under said *last mentioned contract*. [Printed record, p. 30].

These allegations are all traversed by the replication. [Printed record, p. 16, script, 33 and 34.]

The replication proceeds further, thus:

"Plaintiff admits that said Hensley signed a paper which was handed him to sign by the duly authorized station agent of the B. & O. Railroad, and which said station agent called a release, but that he did so under protest and without reading or knowing the contents of same; and that he persistently refused to sign the said paper so presented until he was informed by said duly authorized station agent that the said cattle could not be moved until he did so; and plaintiff (defendant in error) further says, that there was no other railroad or means by which he could safely transport said cattle from said Parkersburg to said city of Philadelphia."

The authority of Hensley to make the contract as agent for the defendant is alleged in the answer, and is denied in the replication; the burden of the issue is therefore upon the plaintiff in error. There is nothing in the testimony tending to prove any such authority. In truth, Hensley, in signing the contract, did not assume to represent McCarthy, but himself alone. His office was to feed and water the cattle by the way, and not to alter or make new contracts for McCarthy, nor yet to release carriers. The contract on the face shows that it was a contract with Hensley—McCarthy nowhere appears in it.

The following is all of the testimony given by both plaintiff and defendant touching the Parkersburg contract, to-wit,—that of defendant in error, [printed record, pp. 19 and 20]:

"That the contract set forth in the defendant's (plaintiff in error) answer was executed by the said Hensley under protest, and that he refused to sign it until informed by the agent of the B. & O. R. R. Co. that it would not carry the cattle unless he would sign it; and that he did so because he had no other way of getting the cattle to Baltimore except by driving."

That of the plaintiff in error, [printed record, p. 20, script 43], "That the B. & O. R. R. Co. was not able to send the cattle out of Parkersburg on Sunday, because they had not the cars necessary therefor at the time; that they were sent at first opportunity which was on Monday morning; that they were transported over the B. & O. Railroad, the contract executed at Parkersburg and set forth in the defendant's answer, having been previously signed."

This contract was made on *Monday, the 29th* of September. The answer of the plaintiff in error as well as the testimony in the case shows that the cattle had previously—two days previously—gone into the custody of the B. & O. R. R. Co., under, and to be carried under the contract made at East St. Louis. The answer says [printed record, p. 11, script p. 21] that the Marietta & Cin. R. R. Co., carried and delivered the cattle "to the B. & O. R. R. Co., the next connecting line of carriers with suitable instructions for their carriage the remainder of the way to their point of destination. That the said B. & O. R. R. Co., *then* and *there received* them" etc., etc.

The undisputed testimony is that the cattle left Cincinnati *Friday* morning, Sept. 26th and reached Parkersburg Saturday afternoon, Sept. 26 (27th) five hours late. [Printed record, p. 19—script 39].

1st. The instruction No. 3, asked by the plaintiff in error is open to all of the objections to which No. 2 is subject, and more. It was doubtless intended to apply to the defence under the Parkersburg contract. If this was its purpose it was bad because it assumed the truth of the facts at issue, and left nothing for the jury. It was practically a direction to disregard as well the issues as the evidence.

2d. The charge of the judge in respect to the Parkersburg contract. If the contract was obtained by duress of goods as supposed by the replication and evidence, it will not support the defence. As was said by his Honor the Circuit Judge (Dillon), in delivering his opinion of the Court on the demurrer to the replication [Pr. Record, pp. 16 and 17]: "It would be against public policy to declare binding a contract made under such circumstances, or to countenance any such conduct or oppression as this on the part of a railroad company."

United States vs. Gordon, 7 Cranch Cir. Court, R. 287.

Collins vs. Westbury, 2 Bay (S. C.) 211.

Foshay vs. Ferguson, 5 Hill (N. Y.) 158.

mony vs.Har Bingham, 12 N. Y. 99.

A contract to be binding must be made upon reasonable conditions of equality.

Farmers and Mechanics Bank vs. Camplain Transp.
Co., 23 Vermont, 186.

3d. The charge of the court in respect to the defence under the Parkersburg contract, the issues and evidence in the case being considered, was greatly more favorable to the plaintiff in error than the case justified.

The facts pleaded do not constitute a defense to the action, and the court ought to have so charged the jury. The action was for damages for malperformance of a contract of affreightment for transportation of goods from East St. Louis to Philadelphia. The plea admits the contract to carry the entire distance, but it is not pretended that the contract was complied with: nor that the carrier was prevented or hindered from complying by any act of the shipper; the plea shows that after the goods had been carried two-thirds of the way, the defendant hired *another carrier to complete the transportation*, and that under the new hiring the transportation was completed.—but for anything that appears in the plea all of the damage suffered by the defendant was the natural and necessary result of the plaintiff's misconduct. There is nothing in the plea to show that the damages sued for or any of them happened while *the goods were in the hands of the new carrier under the new contract*. The plea is neither a denial nor a justification of the action. Everything alleged in the plea may be admitted and still the defendant in error was entitled to recover as demanded in his petition. If this be true the defense was not available to the plaintiff and the charge was therefore no detriment to it.

4th. As we have seen, the defense pleaded was not only not proved, but there was no evidence tending to prove it; and therefore the plaintiff was not entitled to avail itself of the plea and was not hurt by the charge.

5th. The answer and the evidence, as we have seen, both show that at the time this villainous and oppressive contract was extorted from Hensley the B. & O. R. R. Co. was and for two days prior thereto had been in custody of the cattle *as the agent* or *servant* of the plaintiff in error, under the contract made at East St. Louis, and the plaintiff is estopped from setting up or taking any benefit from the wrongful act of its agent.

IV.

The next and last ground of error presented and argued by the plaintiff, is the refusal of the Court to give the plaintiff's instruction numbered 4. [Plff's Brief, p. 24. Pr. Rec., p. 21].

When this instruction was asked by the plaintiff, and refused by the Court, it was not understood by any one as having any sabbatarian significance, and the Honorable Judge who presided at the trial, would be filled with amazement to see the use to which the instuction and the refusal to give it is sought to be put in this court.

The plaintiff in error had proved on the trial [Pr. Record, p. 20--script 42--43] "that the B. & O. R. R. Co. was not *able* to send the cattle out of Parkersburg on Sunday ☞*because they had not the cars necessary therefor at the time*". No excuse was urged on the score of the *day*, the excuse relied on was insufficiency of means of transportation. When, therefor, the instruction was presented the court and everybody else, except it may be the author, supposed, and had the right to suppose that it was intended to apply to that aspect of the case which was presented by the evidence.

The Court did right in refusing the instruction as well because it was a bad presentation of the case as made by the evidence as because it was at best but a mere abstraction in no wise involved in the issues, nor supported by the evidence and calculated only to mislead and confuse the jury.

The charge of the court as a whole, in connection with the instructions given fairly present the law of the case: and as the verdict is manifestly for the right party, and as the grounds of complaint are frivolous, and as the writ of error was prosecuted merely for delay, the defendant in error asks that he be awarded damages on the affirmance of the judgment below.

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